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Wisconsin Supreme Court

WISCONSIN REPORTS

128

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 17—JUNE 21, 1906

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
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1907

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 122.

Page 650, line 6. For not affecting, read affecting.

VOL. 127.

Page 474, line 23. For ORREN T. WILLIAMS, read WARREN D. TARRANT.

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IN MEMORIAM.

SAMUEL NORRIS DICKINSON.

On the 8th day of May, 1906, Mr. Solon L. Perrin, on behalf of the Douglas county bar, presented the following memorial of the late SAMUEL NORRIS DICKINSON:

Memorial of the Douglas County Bar Association.

Death, however gently and peacefully it may come, at any period of life, even when expected and almost desired, is always sure to bring a touch of sorrow, and we mourn with those who mourn. But when death comes in tragic form, suddenly, like a thunderbolt from a clear sky, and crushes out life, then death is terrible, filling us with horror and shocking our sensibilities.

The bar association of Douglas county, being profoundly moved by the sudden and tragic death of SAMUEL NORRIS DICKINSON, one of our oldest and most honored members, has assembled to give fitting expression of its sorrow and to do what we may to honor the memory of our departed brother.

SAMUEL NORRIS DICKINSON was born in Wellsboro, Tioga county, Pennsylvania, July 24, 1833. He was educated at the school of East Hampton, Massachusetts. He read law in the office of Johnson & Brown at Warren, Pennsylvania, and was admitted to the bar of the court of common pleas at that place on August 17, 1857, and in the courts of Tioga county, Pennsylvania, on the 25th day of September, 1857. Shortly thereafter he removed to Illinois, and was admitted to all the courts of that state on January 2, 1858. Removing to Wisconsin, he was admitted to practice in the circuit court in Clark county in this state, on motion of Carl C. Pope, September 6, 1858, and to the federal courts for the western district of Wisconsin on February 24, 1871. He was admitted to the practice of the supreme court on June 3, 1873. He practiced at Neillsville a short time, removing thence to Sparta, where he became a member of the firm of Montgomery, Tyler & Dickinson. Later Mr. Montgomery withdrew, and the firm continued as Tyler & Dickinson. Another change was made when Mr. Tyler sold his interest to W. M. Graham, when the firm became Dickinson & Graham. In 1889 the firm dissolved and Mr. DICKINSON removed to Chippewa Falls, where he formed a co-

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partnership with Dan Buchanan, Jr. In 1891 the firm removed to Superior, where the firm of Knowles, Dickinson, Buchanan, Graham & Wilson was formed. In April, 1897, DICKINSON and Graham formed a partnership with E. C. Kennedy under the firm name of Dickinson, Kennedy & Graham. This firm did a general law business for a short time and dissolved, and for the last two or three years of his life Mr. DICKINSON was alone in business. He was appointed a member of the board of law examiners by the supreme court June 24, 1897, and remained constantly on the board until his death. He died November 6, 1905. Such, in brief, is the professional life of our departed friend and brother, but it covers many long years of tireless industry and hard professional work.

In his death this association and the legal profession has lost one of its most distinguished members, and the city of Superior one of its best citizens; and not only Superior, but the state of Wisconsin as well.

Judge DICKINSON, as he was called, was a man whom all respected. He was able, honest, courageous, true. He was a type of America's best citizenship. He worked hard, he persevered, and he always gave the best service that was in him. There was no guile in his composition. He hated sham and deceit. He was open and aboveboard in all his dealings, professional and otherwise. His position on every question relating to the welfare of the people was known and could be relied upon. He was a plain man and belonged to the plain people. He was democratic in his views and tastes to the backbone. There was no cant or hypocrisy in his nature. He was a good man, a patriotic citizen, and an able lawyer. He was not ambitious for honor or place. If he had been more pliable and politic and ambitious, he might have been elected to the bench, and if he had been he would have filled any judicial position with distinction. He possessed the judicial mind and temperament and had the legal learning and training to pre-eminently fit him for such a place.

In his profession he was a man of great industry, and with his broad attainments and acute and active mind, coupled with a strong physical constitution, he was enabled to accomplish a large amount of professional work.

He was an able lawyer, and that too without the aid of early training in schools and colleges, which is supposed to be so essential to any great success in this learned profession. He was a good all-around lawyer, without any particular specialty. As an advocate he was always strong, forceful, and convincing. He was especially strong upon questions of law before the courts, and in the higher courts he was eminently successful. For more than forty years his life was spent in the courts, and his professional history is written in the many reports of cases which record his work at the bar. His

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absence will be seriously felt in the courts and by his legal brethren, as well as by a large circle of clients and friends.

He sincerely loved outdoor life and sport. Undoubtedly it was his love of hunting that was the prime cause of his death.

His domestic relations were most happy, and his death was a great blow to the surviving members of his family.

We, therefore, as a bar association tender to the bereaved family our heartfelt sympathy, and direct that the secretary cause a copy of this memorial to be presented to them.

Mr. Perrin then spoke as follows:

May it please the Court:—It is thus with a few faltering phrases we sum up the life and works of a pioneer of the Wisconsin bar. For almost half a century this man fought the fight of him who actively practices the profession of the law. We who knew him knew the laborious and painstaking care with which he uniformly addressed the multifarious duties of his professional engagements; we knew his rugged, tireless determination to do, and be for, the right; we knew with what scant courtesy he met the sham and the hypocrite, and that what to the observer sometimes seemed obstinacy and pride of opinion was but the outward evidence of his love of character and worth. And so it is that the few words said and the few lines written by his brethren of the Douglas county bar seem but to cheapen the golden silence of our deep regret for his loss.

When we look back over his life—a life full of industry, full of toil, full of achievement,—when we recall his courage, his indomitable perseverance under the difficulties which beset early professional life in Wisconsin, his sturdy integrity and fair dealing,—no stronger, truer word can be said of Judge DICKINSON than that he was an honest man—honest in thought, honest in purpose, honest in practice. That he was of strong convictions none will deny; that he possessed in a high degree that courage which is so essential to the maintenance of conviction we all know; but he was greater than this, for he had in a marked degree that strength of character, that love of right thinking and of right doing which enabled him so often to forcefully influence others to do right and be right.

Our profession is better for having had such men. They mark time in the advance of human progress; we turn to them for guidance and they counsel us; they are the beacon-lights of the republic, the safeguardsmen in the administration of the law and the orderly conduct of affairs; sometimes radical in expression, they are always conservative in application, and, looking to the future, mould the alloy of present thought and opportunity into the coin of benign results.

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The influence for good of Judge DICKINSON upon the bar of Wisconsin and, through it, upon the people of the state is yet unwritten and unrecorded. As the younger members of our profession shall hereafter, by their lives and works, write the history of the bar and of the courts of the state, so shall they write the history of the years of his painstaking effort in the upbuilding of professional ethics, the inculcation of that spirit of rugged honesty and indomitable purpose which was his light and guide through life, the glory of his declining years, the pride of his remaining brethren at the bar, and an indestructible heritage to his children.

May it please the Court:—By direction of the bar of Douglas county, I move that its resolutions of tribute, inadequate though they are, but none the less heartfelt and sincere, be made a part of the records of this court.

On behalf of the court, Mr. Justice MARSHALL responded:

With mingled feelings of profound sorrow and mournful satisfaction I perform the duty assigned to me of expressing willingness of the court to grant the request from the bar that the memorial tributes to our deceased brother DICKINSON may be spread upon our records.

It were better, perhaps, that one not so long, so intimately and so profitably, in a social, professional, and official way, acquainted with, and so much attached to, our deceased brother, had been appointed to speak now to his memory for the court. Without the restraint of official duty which guards us against permitting error to be obscured by sympathy, or truth, even, to be immoderately proclaimed, the pleasant memories of the past, and the thought that only as our brother is observed in memory shall we ever see him again, might in the warmth of deep regret cause one to throw upon the screen of public observation an exaggerated picture of him; though, he was so noble, so generous, so pure in heart, so able, so well balanced in every way we may view him, so manly a man in every walk of life, yet so disposed to avoid the least semblance, even, of effort to attract attention to himself, that to those who were not near him, want of appreciation might be mistaken for exaggeration. Let the memory we have of how intensely he abhorred all undeserved rewards be a mantle about us in this hour, as we make up the final record by which he shall be remembered in this presence!

He loved and promoted at all times the really good, the really true, the really beautiful in thought and deed. He could not wear a mask of one thing to accomplish the opposite. No professional duty in his estimation required it, or excused it. In that spirit, if he could speak to us, he would ask to have his history written. Whis-

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pering back as it were from the World seen only here through faith and hope, we seem to hear him now express preference to be known only for what his name really stood for in life, in harmony with the poet's thought:

"My epitaph shall be my name alone.
If that with honor fail to crown my clay,
Oh, may no other fame my deeds repay;
That, only that, shall single out the spot,
By that remembered or with that forgot."

I might, perhaps, well pause and speak the final word. Our brother's history and character and worth are too well vindicated by that which has been so fully and appropriately said at the bar to need supplementing. I could only confirm the depth of appreciation and sorrow already expressed. The multiplication of words might impair instead of add to it. Those feelings of sorrow which fill one's heart to overflowing, the keenest appreciation of personal and public loss by the hand of death, the fullest consciousness of the suddenness and unexpectedness of a lightning's flash from out a cloudless sky with which another, and that one of our best beloved friends and professional brethren, has been enveloped and obscured from us in the mystery of mysteries, named death; that we can never meet him again, as we have been wont to do, lo these many years in social, professional, and official relations—might, perhaps, be best expressed in fewest words, but we venture to proceed a step or two.

Brother DICKINSON from the standpoint of well balanced character, without danger of overstatement, may be justly said to have been great. He had none of the dazzling qualities of genius, which are often faculties abnormally developed to the detriment of others necessary to true greatness. But a man may be great in a popular sense, yea, he may be a veritable genius, and yet be wanting in those elements of heart and intellect,—of gentleness, of fidelity, of generosity, of charity, of honesty, and the like, so characteristic of our brother,—which, if not essential to the truly great, absence of them robs greatness of its otherwise really exalted significance.

There may have been greater men than Mr. DICKINSON, but viewing his life by the standard of measurement suggested, he was great. There may have been better men than he. I could not name them. If any I know, the preponderating significance is too minute to be appreciated.

Some men are good lawyers, in common acceptation, without being good men or good citizens. Some are the latter without being the former. Brother DICKINSON was both in combination. He was a good lawyer, a good man, a good citizen, with all those terms in their broadest sense signify. He was able by nature, he was learned,

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he was generous, he was pure in heart. In all that and other qualities which go to make up the most useful of men in home and in private and public life, he was distinguished. In the domestic circle he was uniformly devoted and kind. In his relations to his brethren out of service, or as an associate in professional labor, or an adversary therein, he was always a gentleman. For respectfulness and helpfulness in his relations with the court he approached the ideal, while he was a veritable harbor of refuge for the troubled with wrongs to be redressed or rights to be vindicated. As a friend, he was a priceless treasure.

"Life is all the sweeter that he lived,
All he loved seems sweeter for his sake;
Death is all the brighter that he died,
Heaven is all the brighter that he's there."

. . . . . .

"He has done the work of a true man;
Crown him, honor him, love him;
Weep over him tears of women;
Stoop manliest brows above him,
For the warmest of hearts is frozen,
The freest of hands is still,
And the gap in our picked and chosen
The long years may not fill."

With the receding music of those lines bearing the beautiful sentiments of the poet, chosen apart from the impersonal, as it were, to breathe a heart's own last tribute here of admiration and love, I will close the court's response by ordering the memorial and accompanying remarks to be spread upon the journal.

It is so ordered.

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CASES DETERMINED

AT THE

January Term, 1906.

WOODARD and another, Appellants, vs. GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK, Respondent.

January 12—April 17, 1906.

Insurance against fire: Waiver of forfeiture: Rights of mortgagee: Judgment notwithstanding special verdict: Practice.

1. Under the provision of the standard fire insurance policy that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void if foreclosure proceedings be commenced with the knowledge of the insured, a forfeiture for that reason was not waived by mere silence of the insured after knowledge of the facts, nor by its retention of proofs of loss which it did not invite, nor by its failure to tender back the unearned premium, even though the insured was thereby induced to believe that the policy would be continued in force notwithstanding such foreclosure proceedings. *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, and other cases in which the insured was put to trouble and expense at the request of the insurer, after the latter had knowledge of the forfeiture, distinguished.
2. A mortgagee as to whom a fire insurance policy provides merely that the loss, if any, shall be payable to him as his interest may appear, has no greater rights, after a forfeiture, than has the insured.
3. Where the findings of a special verdict in connection with the undisputed evidence would not sustain a judgment for plaintiff, it is immaterial, upon rendering judgment for defendant notwithstanding the verdict, whether or not the verdict be set aside or the answers therein changed.

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APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was brought to recover $1,000, loss under a Wisconsin standard fire insurance policy contract issued by defendant to plaintiff *C. W. Woodard* on a store building. There was attached to the policy a clause providing for payment to plaintiff *Anna Ulwelling* as her interest might appear. The insured, *Woodard,* and mortgagee, *Ulwelling,* brought suit to recover on the policy, claiming a total loss. The defendant contested the right to recover on three separate and distinct grounds: (1) That prior to the making of the contract in suit the plaintiff *Woodard* had procured other insurance on the property insured by defendant in the amount of $1,500, which was in force and effect at the time of the fire, and that permission was given by the defendant to carry other insurance to the amount of $1,000 only. (2) That the policy by its terms provided that it should be void if foreclosure proceedings were commenced with the knowledge of the insured, and that the plaintiff *Ulwelling* commenced foreclosure proceedings on her mortgage covering the property, and that the summons and complaint were personally served upon the plaintiff *Woodard,* and that no agreement was indorsed on the policy or added thereto waiving the forfeiture occasioned by the foreclosure proceedings. (3) That the plaintiff *Woodard* was guilty of fraud and false swearing in making proofs of loss. To avoid the forfeiture claimed on the part of the defendant, plaintiffs claimed waiver by notice to the agent of defendant of the prior insurance before the issuance of the policy in suit, and knowledge of the foreclosure proceedings after commencement thereof and before the fire without objection, receipt of proofs of loss, and failure to return unearned premium. After plaintiffs put in their evidence defendant moved for a nonsuit, which was denied. After the evidence was all in, defendant moved for a directed verdict, which was denied.

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The trial resulted in the following verdict:

"(1) Was defendant's agent, N. E. Lane, informed before the issuance of the policy of insurance described in plaintiffs' complaint, to wit, on the 4th day of December, 1901, that there was then a policy of insurance existing upon the same property described in plaintiffs' complaint? *Answer.* Yes. (2) Did defendant's agent, N. E. Lane, have notice of the commencement of the foreclosure of the mortgage executed by plaintiff *Woodard* to *Anna Ulwelling* on the said real estate described in plaintiffs' complaint, on or about January 15, 1902? *A.* Yes. (3) If you answer question No. 2 by 'Yes,' did defendant's said agent, Lane, by his silence and failure to tender back any portion of the premium for which said policy was issued, induce the plaintiff *Woodard* to believe the said policy of insurance would be continued notwithstanding the commencement of said foreclosure proceedings? *A.* Yes. (4) If you answer question No. 3 by 'Yes,' was the said plaintiff, *Woodard,* induced to believe that said policy was still in force? *A.* Yes. (5) If you answer question No. 4 by 'Yes,' was plaintiff *Woodard,* owing to said attitude of defendant, put to the expense of filing proofs of loss? *A.* Yes. (6) Did the fire of January 25, 1902, which broke out in said building insured by defendant against loss by fire, wholly destroy the same? *A.* Yes."

After verdict defendant moved to change the answers to the questions and for judgment. The court ordered judgment for defendant notwithstanding the verdict, dismissing the plaintiffs' complaint with costs, from which this appeal was taken.

Rublee A. Cole, for the appellants.

For the respondent the cause was submitted on the brief of *John Barnes,* attorney, and *E. D. Minahan,* of counsel.

The following opinion was filed January 30, 1906:

KERWIN, J. It is undisputed that after the issuance of the policy an action to foreclose a mortgage owned by plaintiff *Ulwelling* upon the property insured was commenced without

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the consent of the defendant and with the knowledge of the insured, *Woodard,* and it is not seriously disputed but that the commencement of such action worked a forfeiture of the policy; but it is claimed on the part of the plaintiffs that such forfeiture was waived by defendant, and that by its acquiescence in the foreclosure proceedings, receipt of proofs of loss, and failure to return unearned premium it elected to treat the policy in force, and that such conduct on the part of the defendant after knowledge of the forfeiture amounted to a waiver or operated as an estoppel. The foreclosure action was commenced some ten days or more before the fire, and there is evidence tending to show that the agent of the company had knowledge of such action prior thereto. The plaintiffs made and served proofs of loss and commenced action to recover on the policy, claiming upon the trial, by way of establishing a waiver of the forfeiture occasioned by the foreclosure proceedings, that they had been put to trouble and expense in making proofs of loss and examining the remains of the destroyed building, without any objection on the part of the defendant, or assertion that it elected to stand upon the forfeiture of the policy, and that it retained the proofs of loss and did not return or offer to return the unearned premium, and that such conduct on its part amounted to a waiver of the forfeiture under the decisions of this court. But an examination of the cases cited by counsel for appellants will show that they do not sustain his contention. In *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108; *Cannon v. Home Ins. Co.* 53 Wis. 585, 11 N. W. 11; and *Oshkosh G. L. Co. v. Germania F. Ins. Co.* 71 Wis. 454, 37 N. W. 819, the insured in each case was put to trouble and expense at the request of the company in the preparation and making of proofs of loss after the company had knowledge of the forfeiture; and in *Renier v. Dwelling House Ins. Co.* 74 Wis. 89, 42 N. W. 208, the general agent recognized the validity of the policy after forfeiture and invited proofs of loss, and

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the insured furnished the same in pursuance of such invitation. In *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46, 65 N. W. 742, the insured was put to expense and delay by the company after knowledge of the forfeiture. In the latter case the insured at the request of the adjuster furnished a carpenter's estimate. There is no proof or finding in the case before us that the plaintiffs were put to any trouble or expense at the request of the defendant. Nor is there any proof or finding establishing a waiver or estoppel. The undisputed evidence shows that defendant simply remained silent. It made no request and took no action inducing trouble or expense on the part of the plaintiffs. What the plaintiffs did, they did at their own volition and without any invitation from, or inducement by, defendant; they commenced action to recover and defendant contested their right. The policy in suit contained the usual provision of standard policies to the effect that it should be void, unless otherwise provided by agreement indorsed thereon or added thereto, if, with the knowledge of the insured, foreclosure proceedings were commenced.

It being established that the policy was forfeited by the commencement of foreclosure proceedings, it only remains to consider whether such forfeiture has been waived. True, the jury found that the agent of the defendant by his silence and failure to tender back any portion of the premium induced the plaintiff *Woodard* to believe that the policy would be continued in force notwithstanding the foreclosure proceedings, and that said plaintiff was induced to believe it was in force, and that he was put to the expense of filing proofs of loss. But these findings are wholly immaterial. The fact that *Woodard* believed the policy would be continued in force, or was induced to so believe by the silence of defendant or its failure to return the premium, cannot avail the plaintiffs. All that is claimed by plaintiffs is that defendant retained the proofs of loss and failed to return the unearned premium

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or notify plaintiffs that it claimed a forfeiture. It is undisputed that defendant was never asked to waive the forfeiture or return any part of the premium, and that it never requested plaintiffs to make proofs of loss or incur any expense whatever. Knowledge on the part of the agent is no evidence of waiver. *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Carey v. German Am. Ins. Co.* 84 Wis. 80, 54 N. W. 18; *Bourgeois v. Mutual F. Ins. Co.* 86 Wis. 402, 57 N. W. 347. Under the standard policy respecting waiver otherwise than as provided in the policy, this court in *Welch v. Fire Asso.* 120 Wis. 456, 464, 98 N. W. 227, said:

"The court has never held, in the face of a policy provision forfeiting the contract for a violation of its provisions by the assured after the issuance thereof, such provision being accompanied by a stipulation that it shall not be deemed waived other than by a writing indorsed thereon, that a waiver could take place in any other manner. The court has often held to the contrary."

In *Keith v. Royal Ins. Co.* 117 Wis. 531, 94 N. W. 295, defense was made on the ground of forfeiture because of change of partners, and that the assured under the policy were not the unconditional owners, and it was shown for the purpose of avoiding the forfeiture that the agent was informed of such change and had knowledge of the facts before the fire; nevertheless it was held that such knowledge was immaterial, since no waiver was made in the manner provided by the policy. After execution of the policy, neither knowledge of the forfeiture coming to the agent, silence on his part, nor failure to return unearned premium amounts to a waiver in the absence of the agreement provided by the policy indorsed thereon or added thereto. *Stevens v. Queen Ins. Co.* 81 Wis. 335, 51 N. W. 555; *Bosworth v. Merchants' F. Ins. Co.* 80 Wis. 393, 49 N. W. 750; *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752; *Keith v. Royal Ins. Co., supra.* Nor does the retention of proofs of loss furnished by the in-

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sured amount to a waiver. *McFetridge v. Phenix Ins. Co.* 84 Wis. 200, 54 N. W. 326. The policy being forfeited by the foreclosure proceedings and no sufficient waiver having been shown, the insured had no cause of action and the mortgagee had no greater right than the insured. *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 80 N. W. 471; *Keith v. Royal Ins. Co., supra.* From what has been said it follows that it is unnecessary to consider the other grounds of forfeiture urged by the defendant.

It is further claimed on the part of the appellants that the defendant was not entitled to judgment notwithstanding the verdict, nor to judgment without setting aside the verdict or changing the answers therein. But it will be seen that the findings in the special verdict fail to establish a waiver of the forfeiture, and such findings in connection with the undisputed evidence would not sustain a judgment for plaintiffs. It was therefore wholly immaterial whether the verdict was set aside or the answers changed. The defendant, upon the undisputed evidence, was entitled to judgment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 17, 1906.

THE STATE EX REL. BURG, Respondent, vs. MILWAUKEE MEDICAL COLLEGE and others, Appellants.

February 6—April 17, 1906.

Mandamus: *Private corporations: Enforcement of contract.*

Mandamus will not lie to compel a private corporation to perform its obligations resting solely on contract with an individual. So *held* as to the contract of a medical college to grant its diploma to one completing the course of instruction and complying with certain conditions.

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APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an appeal from a judgment of the circuit court for Milwaukee county awarding a peremptory writ of *mandamus* commanding the appellant to issue to respondent a diploma of graduation from the dental department of the *Milwaukee Medical College.* The facts set up on petition for writ, so far as material, are substantially to the effect that the appellant *Milwaukee Medical College* is a corporation organized and existing under the laws of the state of Wisconsin and particularly ch. 86, Stats. 1898, and the acts amendatory thereto; that said corporation was organized, among other things, to conduct and maintain a medical college for the purpose of teaching medicine, surgery, and dentistry, with power to issue diplomas and confer degrees upon graduates of said college, and that said corporation has maintained and conducted a dental college; that the defendants *Earles* and *Hill* are and were president and secretary during the times mentioned; that in 1902 the appellant *Milwaukee Medical College* represented and advertised that all persons received as students, who should complete the course prescribed for its dental department, should be entitled to and should receive a degree of doctor of dental surgery, and receive a diploma certifying that such attainments had been achieved as entitled persons holding such diplomas to enter upon the practice of dentistry in the state of Wisconsin, or elsewhere according to law, and that, upon receiving such diploma, students would thereupon be entitled to receive a license without further examination; that said appellant college gave out and advertised in the summer of 1902 that it was a member of the National Association of Dental Faculties and regulated in accordance with its rules, which rules provided for preliminary educational requirements beginning with the sessions of 1902 and 1903, which should be a certificate of entrance into the third year of a high school or its equivalent; that said appellant *Milwau-*

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kee Medical College gave out and advertised during the summer of 1902 that it subscribed to the rules governing the conduct of dental colleges in the state of Wisconsin adopted by the board of dental colleges, and that entrance requirements might be completed during the first year; that the diploma of appellant is of great pecuniary value and entitles the possessor to a license from the Wisconsin state board of dental examiners, and to the right to a lawful practice of a lucrative profession; that on October 3, 1902, in accordance with the requirements of admission, the petitioner matriculated as a regular student of the dental department and paid the matriculation fees required; that he expended time and money, paid his fees with the agreement and understanding that, upon completion of the full college course in compliance with the rules of the college and passing final examinations at the close of the college course, the appellant would give petitioner, and petitioner would receive from said corporation, a diploma conferring the degree of doctor of dental surgery; that since October 3, 1902, and up to and including the time of final examinations in May, 1905, petitioner was and continued to be a regular student and performed all the work for the full three years' course and regularly and successfully passed all final examinations required and is legally entitled to receive a diploma from appellant, and has demanded the same, and said appellant has refused and does, without reason or excuse, refuse to issue such diploma; that prior to October 4, 1902, one Hesse was special dental examiner, duly appointed by the board of dental examiners of the state of Wisconsin, and that between October 4 and 11, 1902, petitioner attended examinations conducted by said Hesse, but subsequent thereto was informed that he had failed to pass said examinations, but, relying upon the representations made by the appellant, proceeded to complete his entrance requirements, and did thereafter during the first year of his attendance complete said requirements, and in December, 1902, January and

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April, 1903, made application to the college and to said Hesse for re-examination as to his qualifications, which requests were refused, and thereafter petitioner applied to the county superintendent of Green Lake county, Wisconsin, and duly and satisfactorily passed examinations and on April 8, 1903, received from said superintendent a teacher's second-grade certificate, which is equivalent to the preliminary educational requirements of entrance under his contract at the time he matriculated; that said certificate was accepted by appellant as satisfactory evidence that he had duly completed his entrance requirements during the first year; that said petitioner was directed by appellant to present said certificate to said Hesse as state dental examiner, but said Hesse refused to consider or examine it; that before petitioner matriculated the appellant was a member of the National Association of Dental Faculties and conducted in accordance with its rules, and that under such rules it was the custom to allow students who might be deficient in entrance requirements to complete the same during the first year of attendance; that advertisements and representations made and contained in the catalogue of appellant college in the year 1902 and prior thereto were made and published with the knowledge, notice, and acquiescence of the board of dental examiners, and that with such knowledge said board licensed to the practice of dentistry in the state of Wisconsin students graduated from said *Milwaukee Medical College* who had, to the knowledge of said board and said college, completed their entrance examinations during the first year of attendance, and that said board of examiners at various times prior to October, 1902, and on the 15th of June, 1903, with knowledge of such facts recognized and declared said *Milwaukee Medical College* a reputable dental college; that said appellant is a reputable dental college in the judgment of the board of dental examiners, and, upon presentation of diplomas and payment of fees, the regular graduates are duly licensed to practice dentistry in the state

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of Wisconsin, and that upon the issuance of a diploma of graduation and presentation thereof, together with the required fee, to the board of dental examiners, a license will be duly issued to petitioner; that all matters requiring the exercise of discretion upon the part of the appellant relative to granting such diploma have been passed upon and decided in favor of petitioner; that the relief sought does not call for the exercise of discretion, but for the performance of a ministerial act.

The return substantially admits the allegations of the petition, but avers that on October 1, 1902, the defendants received notice from the state board of dental examiners that the rule or custom theretofore existing permitting students to make up any deficiencies in entrance qualifications during the succeeding twelve months was abrogated, and would no longer be recognized, and that at or about the time of the matriculation of said petitioner in the dental department of appellant college, or very soon thereafter, he was notified of such change of rule, and that he, nevertheless, insisted upon continuing in said college and in pursuing said college course; that in March, 1905, defendants received notice from the state board of dental examiners that the petitioner, on account of his failure to comply with the rule relative to entrance qualifications, should not be graduated and should not be granted a diploma, and that he should receive no credit for his first year's work in said dental department of appellant college; that in refusing said diploma defendants have complied with and followed the requirements of the state board of dental examiners for the state of Wisconsin.

The case was tried by the court and the facts found substantially as alleged in the petition and return, and judgment ordered against the appellant awarding a peremptory writ of *mandamus,* which was issued.

For the appellants the cause was submitted on the brief of *Fiebing & Killilea.*

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For the respondent there were briefs by *Theodore Kronshage, Jr.,* and *Timlin & Glicksman,* and oral argument by *W. H. Timlin.*

The following opinion was filed February 23, 1906:

KERWIN, J. It appears from the record that the ground of petitioner's action is that he contracted with appellant *Milwaukee Medical College* for a course in the dental department of its college and completed the prescribed course, paid the required fees, and performed all the conditions of the contract on his part to be performed, and under the terms of his contract with the appellant and the performance thereof he became entitled to a diploma, and that the appellant refused to deliver the same to petitioner. The case made is clearly one of breach of contract, and the question arises whether *mandamus* will lie to compel a private corporation to perform its contract. This question was not discussed by counsel in their briefs or upon oral argument, so we are without the valuable aid which investigation and discussion by counsel would afford. *Mandamus* is a remedy only to be applied in extraordinary cases where there is no other adequate remedy. Where the applicant has an adequate remedy by action the writ will not be awarded. *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 679, 70 N. W. 300; *Clarke v. Hill,* 132 Mich. 434, 93 N. W. 1044; *King v. London A. Co.* 1 Dowl. & R. 510; Wood, Mandamus, 1; Shortt, Mandamus, 233. It is granted usually for public purposes to compel the performance of a public duty imposed by law. It has been said that "it is used only in extraordinary cases, and where the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and where without its aid there would be a failure of justice." High, Extr. Leg. Rem. (3d ed.) § 5. The writ of *mandamus* lies to compel the performance of a public duty prescribed by statute, and to keep subordinate and inferior bodies and

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tribunals exercising public functions within their jurisdiction, and to compel in proper cases the performance of specific duties imposed by law. *State ex rel. Wis. T. Co. v. Janesville St. R. Co.* 87 Wis. 72, 79, 57 N. W. 970; *State ex rel. Buchanan v. Kellogg, supra; State ex rel. Hawley v. Polk Co.* 88 Wis. 355, 60 N. W. 266; *State ex rel. Cuppel v. Milwaukee C. of C.* 47 Wis. 670, 3 N. W. 760; *State ex rel. Jacquith v. Wis. C. R. Co.* 123 Wis. 551, 102 N. W. 16; *State ex rel. Bergenthal v. Bergenthal,* 72 Wis. 314, 39 N. W. 566; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 574, 88 N. W. 587; *Kennedy v. Board of Ed.* 82 Cal. 483, 22 Pac. 1042; *People ex rel. Union Ins. Co. v. Nash,* 47 Hun, 542; Shortt, Mandamus, 228; Wood, Mandamus, 5; High, Extr. Leg. Rem. (3d ed.) § 320*f*.

It seems, however, to be well settled that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by *mandamus*. The authorities in England and this country appear to be quite uniform to this effect. *King and Wheeler,* Cases temp. Hardw. 99; *Ex parte Robins,* 7 Dowl. Prac. Cas. 566; *King v. Mayor,* 2 Term R. 259; *King v. Bank of England,* 2 B. & Ald. 620; *Queen v. Orton,* 14 Q. B. 139; *Benson v. Paull,* 6 El. & Bl. 273; High, Extr. Leg. Rem. (3d ed.) §§ 25, 321; *People ex rel. Union Ins. Co. v. Nash, supra; State v. Rep. R. B. Co.* 20 Kan. 404; *People ex rel. Nat. C. Co. v. Dulaney,* 96 Ill. 503; *Tobey v. Hakes,* 54 Conn. 274, 7 Atl. 551; *State ex rel. Poyser v. Trustees,* 114 Ind. 389, 16 N. E. 808; *State ex rel. Mt. P. C. Co. v. P., N. & N. Y. R. Co.* 43 N. J. Law, 505; *State ex rel. Rosenfeld v. Einstein,* 46 N. J. Law, 479; *State ex rel. New Orleans v. N. O. & N. E. R. Co.* 42 La. Ann. 138, 7 South. 226; Shortt, Mandamus, 231; Merrill, Mandamus, § 16; *State ex rel. Board v. Zanesville & M. T. Co.* 16 Ohio St. 308; *State ex rel. Bohannon v. County Court,* 39 Mo.

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375; *Storer Post No. 1 v. Page,* 70 N. H. 280, 47 Atl. 264; *People ex rel. Coppers v. Trustees,* 21 Hun, 184, 195. In High, Extr. Leg. Rem. (3d ed.) § 25, in speaking of *mandamus* it is said:

"It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by *mandamus.* A contrary doctrine would necessarily have the effect of substituting the writ of *mandamus* in place of a decree for specific performance, and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights."

From the foregoing cases and many others which might be cited it seems clear that *mandamus* will not lie to compel a private corporation to perform its contract with an individual. In *State ex rel. Poyser v. Trustees,* 114 Ind. 389, 396, 16 N. E. 811, the court said:

"Duties imposed on a corporation, not by virtue of express law, nor by the conditions of its charter, but arising wholly out of contract relations, will not be enforced by *mandamus,* since the use of such writ is limited to the enforcement of obligations imposed by law. Where the duties of a corporation, or of its trustees, grow out of or result from matters of contract, writs of mandate will not lie against the corporation or its trustees, either in their corporate capacity or as individuals, to compel the performance of the contract, but the party aggrieved will be left to the ordinary remedies, either at law or in equity."

In the case before us the liability of the appellant college rested solely on contract between it and the petitioner. If the petitioner was entitled to his diploma and an action for damages was not adequate he could compel specific performance. This was an adequate remedy. *Clarke v. Hill,* 132 Mich. 434, 93 N. W. 1044; *State ex rel. Mt. P. C. Co. v. Paterson, N. & N. Y. R. Co., supra; King v. London A. Co.* 1 Dowl. & R. 510; *Tobey v. Hakes, supra; People ex rel.*

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Coppers v. Trustees, supra. If *mandamus* will issue to enforce the performance of the contract between petitioner and appellant, no reason is perceived why it will not lie in any case by a person to enforce a contract with a private corporation. It is very clear that the writ of *mandamus,* either in England or in this country, was never designed for such purpose. It follows from the undisputed facts that the petitioner was not entitled to a writ of *mandamus,* and therefore the judgment must be reversed and the writ quashed.

By the Court.—The judgment below is reversed and the writ quashed.

Upon a motion for a rehearing counsel for respondent contended, *inter alia,* that the decision in this case is inconsistent with the decisions in *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 89, 90, and *State ex rel. Grady v. C., M. & N. R. Co.* 79 Wis. 259, 262, 263. The existence of an equitable remedy is not a sufficient answer to an application for *mandamus.* There must be an adequate specific legal remedy. *Hardcastle v. M. & D. R. Co.* 32 Md. 32, 35; *People ex rel. La Grange v. State Treasurer,* 24 Mich. 468, 477, 478; *Comm. ex rel. Thomas v. Allegheny Co. Comm'rs,* 32 Pa. St. 218, 223; *People ex rel. Moulton v. Mayor,* 10 Wend. 393; *State ex rel. Richards v. Sneed,* 105 Tenn. 711, 58 S. W. 1070; *Slemmons v. Thompson,* 23 Oreg. 215, 31 Pac. 514, 517; *Durham v. Monumental S. M. Co.* 9 Oreg. 41. The relator's right did not rest wholly in contract. The diploma would entitle him (under sec. 1410*h,* Stats. 1898) to a license to practice dentistry. The fact that the corporation is a private corporation, so called, has never been considered any defense to the writ of *mandamus* if such private corporation is authorized to issue a certificate which confers a certain status or franchise upon its recipient. *People ex rel. Bartlett v. Medical Society,* 32 N. Y. 187; *Board of Ed. v. State,* 100 Wis. 455; *State ex rel. Graham v. Chamber of Commerce,* 20 Wis. 63; *State ex rel.*

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Cuppel v. Chamber of Commerce, 47 Wis. 670; *Jackson v. State,* 57 Neb. 183, 42 L. R. A. 792; *People ex rel. Cecil v. Bellevue Hosp. Med. College,* 14 N. Y. Supp. 490, affirmed 128 N. Y. 621, 28 N. E. 253. A right resting in contract cannot, as a general thing, be enforced by *mandamus;* but where the contract gave the relator the right to come within the class entitled to enforce the performance of a legal duty, and that legal duty determines the status or is of the nature of a privilege, it can be no objection to enforcing such duty that the relator brought himself within the class of persons entitled to enforce it by making a contract. *Whalen v. La Crosse,* 16 Wis. 271; *State ex rel. G. B. & M. R. Co. v. Jennings,* 48 Wis. 549; *State ex rel. White v. Winn,* 19 Wis. 304; *State ex rel. Sloan v. Warner,* 55 Wis. 271; *People ex rel. Adams v. Goss & P. Mfg. Co.* 99 Ill. 355; *State ex rel. Koons v. First Nat. Bank,* 89 Ind. 302; *Hair v. Burnell,* 106 Fed. 280; *State ex rel. Jennings v. Supreme Lodge* (N. J.) 50 Atl. 581; *American W. W. Co. v. State,* 46 Neb. 194, 30 L. R. A. 447; *Richmond R. & E. Co. v. Brown,* 97 Va. 26, 32 S. E. 775. In any event the case should not be thrown out of this court on the court's own motion upon a mere question of practice not involving the jurisdiction of the court, after the case was submitted on its merits and without objection of this kind. *Buffington v. Bardon,* 80 Wis. 635, 640; *Creager v. Wright School Dist.* 62 Mich. 101, 28 N. W. 794; *State ex rel. Abernethy v. Moss,* 13 Wash. 42, 42 Pac. 622; *Jessup v. Carey,* 61 Ind. 584; *State ex rel. Ordway v. Smith,* 11 Wis. 65; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672; *Fuller v. Trustees,* 6 Conn. 532, 544.

The motion was denied April 17, 1906.

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JOHNSTON and another, Appellants, vs. LONSTORF and others, imp., Respondents.

February 5—April 17, 1906.

Municipal corporations: Vacation of streets and alleys: Title of abutting owners: Cul-de-sac: ***Compensation to protesting owners: Statutes: Milwaukee city charter.***

1. The owner of a lot bounded by a public street or alley within a recorded city or village plat takes title to the center of such street or alley, subject to the public easement.
2. The mere fact that a portion of an alley is a *cul-de-sac* does not preclude it from being a public alley.
3. Where a public street or alley has been legally established it can be vacated only by compliance with statutory requirements; and where a city charter gives the council power to vacate, but does not prescribe how that power shall be exercised, the provisions of secs. 904, 927, Stats. 1898, are to be followed.
4. The Milwaukee city charter (authorizing the common council to vacate streets and alleys upon petition of a specified number of freeholders and residents of the ward and upon the necessity therefor being established by the verdict of a jury, but not expressly requiring the consent of, or compensation to, abutting owners) does not give the common council power to vacate a public alley without compensation to the protesting owners of lots abutting thereon.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an appeal from an order dissolving a temporary injunction restraining the defendants from vacating and closing up the portion of the public alley west of Twenty-third street upon which the lots of the respective plaintiffs abut. The portion of the alley in question is in a block bounded on the north by Grand avenue, on the east by Twenty-third street, on the south by Sycamore street, and on the west by Twenty-fourth street, and is twenty-five feet wide, and is located about half way between Grand avenue and Sycamore street, and extends from Twenty-third street west about eight rods to the

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east line of the lot of the plaintiff *Johnston* mentioned, which lot abuts against the west end of the alley and extends from Grand avenue south 210 feet, and is eighty feet wide and fronts on Grand avenue. The lot of the plaintiff *Cowdery* mentioned joins the *Johnston* lot described on the east, and fronts on Grand avenue, and is sixty feet wide, and extends from Grand avenue south 175 feet to the alley upon which it abuts. The defendant *Mrs. Lonstorf* owns the lot fronting on Grand avenue and between the *Cowdery* lot described and Twenty-third street, which is about seventy-two feet wide and extends from Grand avenue south 175 feet to the alley upon which it abuts. The defendants *Mrs. Lamp* and *F. H. Miller,* as trustees under the will of Peter Lamp, who died prior to 1893, own the several lots bounded by the alley on the north, abutting thereon, and extending from Twenty-third street west about 132 feet.

It appears and is undisputed that upon the plat of the lots mentioned, which was duly recorded in 1883, there is dedicated to public use an alley twenty-five feet in width, the west eight rods of which have been described, and which "said alley continued and continues through the remainder of said Grand Avenue Heights addition lying on the east side of Twenty-third street;" that the plaintiffs and each of them purchased their respective parcels of land relying upon the existence of said alley giving them an exit from the rear of their respective lots; that in 1896 the plaintiff *Johnston* built a dwelling house on his lot, fronting on Grand avenue, and at great expense built a barn upon the southern portion of his lot, opening and abutting on said alley, having an exit on said alley for the purpose of ingress and egress to and from said barn; that George Lonstorf, a son of *Mrs. Lonstorf,* residing in the ward in which said premises were situated, was elected an alderman of the ward in the spring of 1904, and that he had taken part in the proceedings resulting in the vacation of the alley; that December 27, 1904, the said George, as such

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alderman, presented to the common council a petition praying for the vacation of the portion of the alley west of Twenty-third street; that said petition was signed by *Mrs. Lonstorf,* but was not signed by any other owner or occupant of land abutting upon said alley, but was signed by some thirty freeholders residing and owning real estate in said ward at points remote from the alley; that in January, 1905, a resolution was passed by the common council and approved by the mayor directing the city engineer to make and file an accurate survey and plat of the portion of the alley proposed to be vacated; that in February, 1905, the engineer filed such survey and plat as so directed, and the same was thereupon approved by the common council and the mayor, and notice of such proposed vacation was thereupon given as required; that pursuant to such notice a jury was selected and in July, 1905, made their report that said alley was no longer of any public utility, and August 21, 1905, a resolution and order was duly passed by the common council and approved by the mayor that said portion of said alley was no longer of any public utility, and the report of said jury and the whole thereof was thereby confirmed; that August 31, 1905, a certified copy of the final order of the common council vacating such portion of the alley, containing a full and accurate description and map and plat of the same, was filed with the register of deeds as required by sec. 3187*a,* Stats. 1898. Thereupon this action was commenced and a temporary injunction was granted restraining the defendants from closing up or fencing in the portion of the alley lying west of Twenty-third street. Upon the complaint and verified answer of *Mrs. Lonstorf* and the trustees under the Lamp will the trial court issued an order to show cause September 25, 1905, why such injunctional order should not be dissolved, and November 1, 1905, the trial court vacated and set aside said injunctional order. From that order the plaintiffs appeal.

For the appellant *Johnston* there was a brief by *Quarles,*

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Spence & Quarles, attorneys, and *J. V. Quarles, Jr.,* of counsel; for the appellant *Cowdery* there was a brief by *Miller, Noyes & Miller;* and the cause was argued orally by *George Lines.* To the point that the vacation of a street is a "taking" of property within the constitutional inhibition, and cannot be lawful without compensation made, counsel for appellant *Johnston* cited Elliott, Roads & Streets, § 877; 27 Am. & Eng. Ency. of Law (2d ed.) 115; *Bigelow v. Ballerino,* 111 Cal. 559, 44 Pac. 307; *Chicago v. Burcky,* 158 Ill. 103; *Meyer v. Teutopolis,* 131 Ill. 552, 23 N. E. 651; *McQuigg v. Cullins,* 56 Ohio St. 649; *Pearsall v. Eaton Co.* 74 Mich. 558; *Chicago v. Baker,* 86 Fed. 753; *S. C.* 98 Fed. 830; *Egerer v. N. Y. C. & H. R. R. Co.* 130 N. Y. 108; *Kane v. N. Y. El. R. Co.* 125 N. Y. 164; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1; *Bannon v. Rohmeiser,* 90 Ky. 48; *Gargan v. L., N. A. & C. R. Co.* 89 Ky. 212; *Rensselaer v. Leopold,* 106 Ind. 29; *Indianapolis v. Croas,* 7 Ind. 9; *Cullen v. N. Y., N. H. & H. R. Co.* 66 Conn. 211, 226; *Lindsay v. Omaha,* 30 Neb. 512; *Van Witsen v. Gutman,* 79 Md. 405; *Webster v. Lowell,* 142 Mass. 324; *Heinrich v. St. Louis,* 125 Mo. 424.

Counsel for appellant *Cowdery* argued, among other things, that the right to pass over a street or alley to and from his land is a right of property in an abutting owner and is special in its nature and differs from the public easement. *Lennig v. Ocean City Asso.* 41 N. J. Eq. 606; *In re Pearl St.* 111 Pa. St. 565; *First Presby. Church v. Keller,* 39 Mo. App. 441; *Dooly Block v. Salt Lake R. T. Co.* 9 Utah, 31, 24 L. R. A. 610; *Ashby v. Hall,* 119 U. S. 526; *Marsh v. Fairbury,* 163 Ill. 401, 45 N. E. 236; *Kimball v. Kenosha,* 4 Wis. 321; *Pettibone v. Hamilton,* 40 Wis. 402; *Donohoo v. Murray,* 62 Wis. 100, 103; *Ford v. Schliessman,* 107 Wis. 479; *Mahler v. Brumder,* 92 Wis. 477. This property right of an abutting owner to the use of streets or alleys is a right for which compensation must first be made if an attempt be made to de-

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prive the owner of it by vacation or other adverse proceedings. *Lathrop v. Racine,* 119 Wis. 461; *Pearsall v. Eaton Co.* 74 Mich. 558, 42 N. W. 77; *Heinrich v. St. Louis,* 125 Mo. 424, 46 Am. St. Rep. 490; *Bigelow v. Ballerino,* 111 Cal. 559, 44 Pac. 307; *Eachus v. Los Angeles C. E. R. Co.* 103 Cal. 614, 42 Am. St. Rep. 149; *Adams v. C., B. & N. R. Co.* 39 Minn. 286, 39 N. W. 629; *Denver v. Bayer,* 7 Colo. 113, 2 Pac. 6; *Rensselaer v. Leopold,* 106 Ind. 29, 5 N. E. 761; *Cadle v. Muscatine W. R. Co.* 44 Iowa, 11; *Transylvania Univ. v. Lexington,* 3 B. Mon. 25; *Lamm v. C., St. P., M. & O. R. Co.* 45 Minn. 71, 47 N. W. 455; *In re Eleventh Avenue,* 81 N. Y. 436; *Moose v. Carson,* 104 N. C. 431, 10 S. E. 689, 17 Am. St. Rep. 681; *Schaible v. L. S. & M. S. R. Co.* 10 Ohio Cir. Ct. 334, 3 Ohio Dec. 233; *Anderson v. Turbeville,* 6 Cold. 150; *Dooly Block v. Salt Lake R. T. Co.* 9 Utah, 31, 33 Pac. 229; *Onset St. R. Co. v. County Comm'rs,* 154 Mass. 395, 28 N. E. 286.

For the respondents there was a brief by *Fiebing & Killilea,* and oral argument by *H. J. Killilea.* To the point that compensation need not be made, they cited *Paul v. Carver,* 24 Pa. St. 207, 64 Am. Dec. 649; *McGee's Appeal,* 114 Pa. St. 470, 8 Atl. 237, 240; *State v. Elizabeth,* 54 N. J. Law, 462, 24 Atl. 495; *Brooklyn Park Comm'rs v. Armstrong,* 45 N. Y. 234; *Kings Co. F. Ins. Co. v. Stevens,* 101 N. Y. 411; *Smith v. Boston,* 7 Cush. 254; *Coster v. Albany,* 43 N. Y. 399; *Fearing v. Irwin,* 55 N. Y. 486; *Heller v. A., T. & S. F. R. Co.* 28 Kan. 630; *East St. Louis v. O'Flynn,* 119 Ill. 200, 10 N. E. 395; *Kimball v. Homan,* 74 Mich. 699, 42 N. W. 167; *Bauman v. Campau,* 58 Mich. 444, 25 N. W. 391; *Glasgow v. St. Louis,* 107 Mo. 198, 17 S. W. 743; *Brady v. Shinkle,* 40 Iowa, 576; *Barr v. Oskaloosa,* 45 Iowa, 275; *State v. Dexter,* 10 R. I. 341; *Stout v. Noblesville & E. G. R. Co.* 83 Ind. 466; *Cummins v. Seymour,* 79 Ind. 491; *Polack v. Trustees,* 48 Cal. 490; *Chicago v. Union Bldg. Asso.* 102 Ill. 379; *Ingram v. C., D. & M. R. Co.* 38 Iowa,

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669; *Concord's Petition,* 50 N. H. 530; *Lutterloh v. Cedar Keys,* 15 Fla. 305. "The only taking in a constitutional sense is a physical appropriation of the thing itself." *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 46.

CASSODAY, C. J. It is conceded that the recording of the plat of Grand Avenue Heights addition in 1883 dedicated to the public use the streets and alleys marked thereon as such. *Pettibone v. Hamilton,* 40 Wis. 402; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 6, 98 N. W. 969. The plaintiffs respectively purchased the lots mentioned by the description of the same as given on said plat. It has long been settled in this state that the owner of a lot bounded by a public street within a recorded village or city plat takes title to the center of the street, subject to the public easement. *Kimball v. Kenosha,* 4 Wis. 321; *Milwaukee v. Milwaukee & B. R. Co.* 7 Wis. 85; *Hegar v. C. & N. W. R. Co.* 26 Wis. 624; *Norcross v. Griffiths,* 65 Wis. 607, 27 N. W. 599, 606; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561, 568, 70 N. W. 678; *Smith v. Beloit,* 122 Wis. 396, 410, 100 N. W. 877; *Lins v. Seefeld,* 126 Wis. 610, 614, 105 N. W. 917, 919. The same is true as to the owner of a lot bounded by a public alley. Elliott, Roads & Streets (2d ed.) §§ 23, 24, 25. It is there said, among other things:

"If the alley is a public one it is a highway, and, in general, is governed by the rules applicable to streets. . . . Whatever may be the dimensions of a way, if it be open to the free use of the public it is a highway; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way, and not the size of the way or the number of persons who choose to exercise that right, determines its character. An alley of small dimensions, actually used by only a limited number of persons, but which the public have a general right to use, therefore, may be regarded as a public way. . . . Where an alley is ordered to be opened by the proper municipal authority it is deemed to be one of the public ways of the mu-

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nicipality. The right of eminent domain may be exercised in opening alleys in substantially the same manner as in opening streets. . . . The rights and duties of a municipal corporation respecting alleys are substantially the same as those respecting streets."

The lot of the plaintiff *Cowdery* described is bounded on the south by the portion of the alley in question, and twenty-five feet of the lot of the plaintiff *Johnston* described is bounded on the east by the west end of the portion of the alley in question. The mere fact that that portion of the alley was and is a *cul-de-sac* did not preclude it from being a public alley. *Schatz v. Pfeil,* 56 Wis. 429, 435, 436, 14 N. W. 628; *Mahler v. Brumder,* 92 Wis. 477, 483, 66 N. W. 502. The right of abutting owners to have a public street or alley remain open is not merely that they may use the same, but that all persons may use it as a public street or alley, free from all claim or interference of the original proprietor, or those claiming under him, inconsistent with such use. *Lins v. Seefeld,* 126 Wis. 610, 105 N. W. 917, 919; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 6, 98 N. W. 969; *Smith v. Beloit,* 122 Wis. 396, 409, 411, 100 N. W. 877, and cases there cited.

The important question presented is whether, by virtue of the proceedings had, the common council and mayor had authority to vacate and close up the portion of the alley in question against the protest of the plaintiffs as such abutting owners, and without compensation. It seems to be pretty firmly settled that, where a public street or alley has been legally established, it can only be vacated, if at all, in the manner prescribed by statute. Elliott, Roads & Streets (2d ed.) § 25; 1 Lewis, Em. Dom. (2d ed.) § 134*a; Cromwell v. Conn. B. S. Q. Co.* 50 Conn. 470; *Miller v. Corinna,* 42 Minn. 391, 44 N. W. 127; *St. Louis, A. & T. H. R. Co. v. Belleville,* 122 Ill. 376, 12 N. E. 680; *Moffit v. Brainard,* 92 Iowa, 122, 60 N. W. 226; *Louisville v. Bannon,* 99 Ky. 74, 35 S. W. 120.

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The statutes authorize "the common council of every city" (sec. 927, Stats. 1898), "upon petition in writing of the owners of lots or land on any street or alley," to "discontinue such street or alley or any part thereof; provided, that all the owners of lots or land on the portion of such street or alley proposed to be vacated and two thirds of the owners of lots or land on the remainder thereof shall sign such petition *and not otherwise.*" Sec. 904, Stats. 1898. It is true that the words "the common council of every city," found in sec. 927, Stats. 1898, and above quoted, applied only to cities organized "under general law;" but that section, as amended, now applies to "the common council of every city, *whether* acting under the general law or under a special charter." Sec. 1, ch. 169, Laws of 1903, and ch. 394, Laws of 1905. This being so, it evidently applies to the city of Milwaukee.

It is very obvious from the foregoing statement that the proceedings taken did not bring the case within the statute quoted, since the petition for vacating the portion of the alley in question was never signed by any of the five owners of land abutting upon that portion of the alley, except *Mrs. Lonstorf,* nor by two thirds or any of the owners of lots or lands abutting upon the portion of the alley east of Twenty-third street. Of course, where a portion of a street or alley is vacated and closed up at the request of all the owners of lands abutting thereon, the question as to compensation to such owners is thereby eliminated. This court has held that: "Where the common council of a city is authorized to vacate or discontinue streets, it must proceed, if the charter does not otherwise provide, in the manner prescribed by" secs. 904, 927, Stats. 1898. *James v. Darlington,* 71 Wis. 173, 36 N. W. 834. That case was distinguished in *Baines v. Janesville,* 100 Wis. 369, 375, 376, 75 N. W. 404, but expressly followed and sanctioned in *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 404, 80 N. W. 1101, where it was held: "Streets can be vacated only by compliance with statutory requirements, and,

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when the charter does not prescribe how such power can be exercised, the provisions of" secs. 904, 927, Stats. 1898, "are to be followed." As already indicated, the amendment to sec. 927 makes it certain that the section as amended applies to the city of Milwaukee.

It is claimed on the part of the city and the other defendants that under the charter the common council had power to vacate streets and alleys without complying with the general provisions of the statute mentioned. In support of such contention counsel seem to rely upon *Brandt v. Milwaukee,* 69 Wis. 386, 388, 34 N. W. 246. That was "an application to the circuit court by the owners of all lands on both sides of an alley . . . to vacate the same." The trial court found that it "had no jurisdiction to vacate an alley in that city," and so dismissed the petition, and the judgment entered thereon was affirmed by this court on the ground "that the circuit court had no jurisdiction." True, it was said in the opinion of the court in that case that among the police powers granted to the common council by the charter was "the power to vacate streets and alleys by ordinance or resolution," subject to the "restrictions on the exercise of such power" therein contained; but the question whether a street or alley, or a portion thereof, could be vacated against the protest of any of the owners of the lands abutting thereon, and without compensation, was not there involved, much less decided or considered.

It is true that the charter, in general terms, gives to the common council power to "open, widen, straighten, and vacate streets and alleys, and establish and alter the grade thereof." Subd. 32, sec. 3, ch. IV, Milwaukee Charter. The charter also declares that "the common council shall have the power to lay out public squares, grounds, streets, and alleys, and to extend, enlarge and widen or vacate the same," upon the petition of "ten or more freeholders" and residents of the ward, as therein prescribed. Sec. 1, ch. VI, Milwaukee Charter. But there is nothing in that section requiring the consent of,

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or compensation to, such abutting owners. The charter also declares that the common council shall have power to vacate, in whole or in part, such streets and alleys, provided the necessity therefor be first established by the verdict of a jury as provided therein for laying out public squares, grounds, and streets. Sec. 22, ch. VI, Milwaukee Charter. Other sections of the same chapter of the charter provide for giving notice to owners and occupants of lands abutting upon such street or alley and the selection of a jury to determine such necessity, and, when determined, the board of public works are required to ascertain and determine "the amount of damages to be paid to the owner or owners of the property proposed *to be taken* and also what lands or premises will be benefited *by such taking,* and make a report of their assessment of such damages and benefits to the council." Secs. 3, 4, 5, ch. VI, Milwaukee Charter. It will be observed that this relates to damages and benefits to the owner or owners of lands so taken, but does not in terms relate to the vacation of a street or alley.

But counsel for the defendants contend that under the language of the sections giving the common council power to vacate streets and alleys, "the same procedure is to be followed in vacating an alley as in laying out, extending, enlarging, or widening a street or alley until after the jury have made their report." The petition in the instant case seems to have been drawn upon that theory; but no proceedings were ever had to secure compensation to such abutting owners as refused to consent to the vacation of the portion of the alley west of Twenty-third street. The question recurs whether, under the charter or otherwise, the common council had power to vacate that portion of the alley in question without compensation to the protesting owners of lands abutting thereon. It is said by a learned writer on such matters that the owners of lands abutting upon a public highway, "who have lawfully and in good faith invested money or obtained property inter-

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ests in the just expectation of the continued existence of the highway," are entitled to the benefit of the old maxim of the common law, "once a highway, always a highway." Elliott, Roads & Streets (2d ed.) § 871. Another leading text-writer on such matters declares that "a street cannot be closed so as to prevent access to abutting property, without the consent of the owners of such property, or compensation paid." 1 Lewis, Em. Dom. (2d ed.) §§ 134, 226*a*. There are plenty of adjudications to the same effect. *Indianapolis v. Croas,* 7 Ind. 9; *Rensselaer v. Leopold,* 106 Ind. 29, 15 N. E. 761; *Bigelow v. Ballerino,* 111 Cal. 559, 44 Pac. 307; *Heinrich v. St. Louis,* 125 Mo. 424, 28 S. W. 626; *Egerer v. N. Y. C. & H. R. R. Co.* 130 N. Y. 108, 29 N. E. 95; *Willamette Iron Works v. Oregon R. & N. Co.* 26 Oreg. 224, 37 Pac. 1016; *Johnston v. Old Colony R. Co.* 18 R. I. 642, 29 Atl. 594; *Pearsall v. Eaton Co.* 74 Mich. 558, 42 N. W. 77; *Horton v. Williams,* 99 Mich. 423, 58 N. W. 369. In this last case the facts were very much like the facts in the case at bar, and it was held in effect that "abutting lotowners have an interest in the land embraced in a public alley, and the city council has no right, under" a statute authorizing it to vacate alleys in the city, "to vacate a portion of said alley, without first compensating said abutting lotowners for any damages by them sustained, though their lots may not abut upon the portion so vacated." To the same effect: *Kimball v. Kenosha,* 4 Wis. 321, 330; *Lathrop v. Racine,* 119 Wis. 461, 473, 474, 97 N. W. 192; *Smith v. Beloit,* 122 Wis. 396, 409, 411, 416, 100 N. W. 877, and cases there cited. Some courts go to the extent of holding that, where the object of the proceeding is to close the alley and allow the land therein to revert to the abutting lotowners for a mere money consideration to be paid to the municipality, it does not constitute "a public use for which private property can be taken from one citizen and given to another." *Louisville v. Bannon,* 99 Ky. 74, 35 S. W. 120; *Moose v. Carson,* 104 N. C. 431, 10 S. E. 689. Most of the cases cited, how-

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ever, go upon the theory that the municipality, when authorized by the legislature, has such power and control over public streets and alleys that it may, in the manner prescribed, vacate the same or any part thereof, upon making compensation to the abutting owners.

It follows from what has been said that the trial court improperly dissolved the preliminary injunction.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

SCHULZ, Appellant, vs. SCHULZ, Respondent.

February 23—April 17, 1906.

Divorce: Discontinuance: Terms: Payment of attorney's fees, etc.: Amount: Excessive allowance: Referee's report advisory only.

1. Upon a motion by the plaintiff husband for discontinuance of a divorce action the court was not bound to discontinue it unconditionally, but might, as a condition, require plaintiff to pay the reasonable attorney's fees and other expenses incurred by the wife in defense of the action, and also an unpaid balance of temporary alimony theretofore due to the wife under a previous order of the court.
2. The attorney's fees which the husband should be required to pay for his wife in a divorce action are such only as will reasonably compensate the services performed in carrying on the litigation, in view of all the circumstances of the case, regardless of the number of attorneys employed; and in a case where numerous attorneys were unnecessarily employed and discharged by the wife without reason or excuse, an allowance of $474.50 is *held* excessive and is reduced to $250.
3. The report of a referee as to the value of attorneys' services for the wife in an action for divorce was merely advisory, and, though there was no exception to such report, the court had full power to modify it and determine for itself the amount to be allowed.

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APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Modified and affirmed.*

In May, 1904, this action was brought by appellant against his wife for divorce on the ground of cruel and inhuman treatment. Defendant, through her attorneys, Sheridan & Wollaeger, answered by general denial and prayed that the action be dismissed. At the time of answering, on motion of defendant, the court ordered plaintiff to pay $25 attorney's fees, $43 per month temporary alimony, and gave defendant the use of the homestead and furniture. The case came on for trial and was continued at defendant's request. Shortly thereafter Mr. Toohey was substituted as attorney for defendant in place of Sheridan & Wollaeger, and defendant paid Sheridan & Wollaeger $50 additional fees, and afterwards paid John Toohey $10, his fees, and J. C. Officer was substituted as defendant's attorney. In October, 1904, J. C. Officer, defendant's attorney, prepared and served an amended answer charging plaintiff with improper conduct, not necessary to relate here, and further alleging that plaintiff was the owner of real estate worth $9,000 and was earning $450 a month and owned personal property of the value of $1,200, and asked that the complaint be dismissed. In January, 1905, plaintiff served an amended complaint setting up the substance of original complaint and charging defendant with improper conduct similar in character to that charged by defendant against plaintiff, averring that plaintiff earned $458 a month and that he was the owner of a homestead worth $5,000, and denying that he had any other property, and praying for an absolute divorce. Defendant paid J. C. Officer $43 and shortly thereafter retained George Sylvester, whereupon J. C. Officer rendered his bill to defendant and agreed to accept $100, balance due for his services.

On February 8, 1905, plaintiff moved to dismiss the complaint and defendant opposed the motion except on terms, and made a counter motion that plaintiff be required to pay $21.50

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temporary alimony due February 1, 1905, also the following sums as attorney's fees: $50 paid to Sheridan & Wollaeger, $10 paid to John Toohey, $43 to J. C. Officer, $100 balance due J. C. Officer, and the sum of $250 to Geo. Sylvester. Both motions came up together and the court referred the matter to W. J. McElroy, Esq., a court commissioner, to ascertain and determine the temporary alimony due, also the value of attorney's fees (each attorney separately) and expenses and disbursements of defendant, and report the same to the court, and set aside a former order made February 3, 1905, directing the sum of $100 paid to J. C. Officer as attorney's fees. Mr. McElroy took testimony and reported to the court that the defendant apparently without reason became dissatisfied with her attorneys, discharged them, and employed John Toohey; that they were paid $25 under order of the court, and afterwards $50 by defendant; that Sheridan & Wollaeger disbursed $3, and that the amount paid them was less than their due; that defendant became dissatisfied with Mr. Toohey, paid him $10, and discharged him; that after the discharge of Mr. Toohey, J. C. Officer was employed and subsequently Geo. Sylvester. The referee found as facts that there was due the defendant as unpaid alimony $21.50; that the services of J. C. Officer and Geo. Sylvester were rendered at request of defendant and were proper and necessary; that there was due J. C. Officer, balance for services, $100; that there was due Geo. Sylvester for services $250.

The court, on motion, confirmed the report and ordered that plaintiff pay, within five days, $21.50, temporary alimony due defendant, also $50 theretofore paid by defendant to Sheridan & Wollaeger, $10 to John Toohey, and $43 paid to J. C. Officer. Also further ordered that plaintiff pay J. C. Officer within five days $100 and Geo. Sylvester $250, and upon payment of said sums aggregating $474.50 the action stand discontinued. Judgment was rendered accordingly,

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from which this appeal is taken. Defendant also moved in this court for a proper and suitable sum for attorney's fees, printing, and traveling expenses on this appeal.

For the appellant there were briefs by *John F. Donovan,* attorney, and *Adolph Huebschmann,* of counsel, and oral argument by *Mr. Donovan.*

For the respondent the cause was submitted on the brief of *George Sylvester.*

The following opinion was filed April 17, 1906:

KERWIN, J. 1. It is claimed on the part of the appellant that the court should have discontinued the action unconditionally, and that it had no power to allow attorney's fees after notice of discontinuance. The notice did not discontinue the action nor did it purport to do so. It was an application to the court for an order dismissing the action. The court had control of the action and could impose reasonable and proper terms as a condition of discontinuance to protect the interests of the parties. *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *Sumner v. Sumner,* 54 Wis. 642, 12 N. W. 21. Under sec. 2361, Stats. 1898, in every action to confirm or annul a marriage, or for divorce, the court or judge may during the pendency of the action make such orders requiring the husband to pay such sums for the support of the wife, and to carry on or defend the action, as in its discretion shall be deemed reasonably necessary or proper. Such orders may be made during the pendency of the action, and the court may, upon rendering judgment of dismissal, order the husband to pay such sum as was reasonably necessary to meet the expenses of defending the suit. *Sumner v. Sumner, supra.* We think it clear that upon motion for discontinuance by the plaintiff in this action he was not entitled to an unconditional discontinuance, but the court had the right in its discretion to require him to pay the reasonable expenses incurred by the wife in defense of the

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action as a condition of such discontinuance. *Sumner v. Sumner, supra.* Counsel contends that after the motion to discontinue the action the court had no power to make any order allowing attorney's fees and expenses. But the motion of itself could not divest the court of jurisdiction or deprive it of the power to make such order as was reasonably necessary to protect the rights of the parties litigant as a condition of discontinuance. The incurring of attorney's fees and expenses by the wife at the suit of her husband for divorce gave her an interest in the action sufficient to enable the court to make proper and suitable orders for the protection of such interest. *State ex rel. Milwaukee v. Ludwig, supra; Sumner v. Sumner, supra.* The plaintiff in this case did not seek to discontinue absolutely of his own motion without the intervention of the court, but applied to the court for an order discontinuing the action, and upon such motion the court had ample power under the statute and decisions of this court to make an order requiring the payment of reasonable attorney's fees and expenses as a condition of discontinuance.

2. It is further contended that the court had no authority to allow $21.50, balance of temporary alimony due February 1, 1905, under previous orders of the court, for the reason that by the discontinuance of the action plaintiff assumed the obligations of husband and was, therefore, bound to support and maintain his wife. But, as before observed, the action had not been then discontinued and the amount of alimony had become due before the motion was made. The court had the right under the statute to require plaintiff to pay such temporary alimony due and unpaid before discontinuance as a condition thereof.

It is earnestly contended, however, that the whole amount ordered paid was unreasonable and excessive, and that, assuming the court had power to order payment, still it abused its discretion in that regard. After plaintiff moved to discontinue, the defendant made a counter motion that he be re-

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quired to pay temporary alimony due and a suitable sum for expenses incurred in carrying on the defense of the action. The matter was referred to a court commissioner to determine the amount of temporary alimony due and unpaid, and also to ascertain and determine the value of attorney's fees, expenses and disbursements of the defendant incurred in defending the action, and report the same to the court. The referee reported to the court, and the court confirmed such report and ordered plaintiff to pay defendant $21.50, balance due for temporary alimony under previous orders; also $50 to Sheridan & Wollaeger, attorneys, $10 to John Toohey, attorney, $43 to J. C. Officer, attorney, $100, balance due said J. C. Officer, and $250 to Geo. Sylvester, attorney, amounting in the aggregate to $474.50, and that upon payment of said sums the action stand discontinued. The question arises whether the amount ordered paid was unreasonable and excessive.

It appears from the record that the defendant unnecessarily employed and discharged at different times different attorneys. It is very obvious that she incurred much larger expenses by way of attorney's fees in consequence of the repeated changes in attorneys than was necessary. No necessity whatever appears for any of the changes in attorneys, and with the exception of the services performed upon appeal to this court but very little necessary services were actually performed in the action on the part of the defendant. It is not the purpose or policy of the statute to allow a wife to tax the husband with fees of as many attorneys as she may employ regardless of the necessities of the case. *Dugan v. Dugan*, 1 Duv. 289. The attorney's fees should be such only as are reasonable and necessary to compensate for the services performed in carrying on the litigation in view of all the circumstances of the case, regardless of the number of attorneys employed. A careful examination of the bill presented for

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services, together with the evidence respecting the same, convinces us that the bill allowed by the lower court was excessive and that the court abused its discretion in allowing such amount. It appears that about half of the bill rendered is made up of charges for services on various motions respecting attorney's fees and substitutions of attorneys. The practice of allowing fees to numerous attorneys unnecessarily employed and discharged by the wife, without reason or excuse, in divorce actions cannot be tolerated. The allowance of attorney's fees in such cases must be measured by the services performed, not by the number of attorneys employed. We think, therefore, in view of all the circumstances of this case that the amount ordered paid as a condition of discontinuance, $474.50, should be reduced to $250. *Williams v. Williams,* 29 Wis. 517.

It is claimed, however, on the part of the respondent that, since no exception was taken to the report of the referee, the court was without power to change the findings. But this does not follow. The matter of fixing the amount of attorney's fees rested with the court. The reference was simply advisory and the report was not binding upon the court. The contention of counsel for respondent that the statute and rules of court as to trial of actions before referees and proceedings thereon apply to mere special proceedings like the one in question, resorted to by the presiding judge for the purpose of obtaining assistance in passing upon the account of attorneys, cannot be sustained. *Harrigan v. Gilchrist,* 121 Wis. 127, 414, 99 N. W. 909.

3. On the motion in this court by the respondent for a suitable allowance to enable her to defray the expenses of defending upon this appeal, we think a reasonable allowance should be made, and, therefore, the sum of $75 is allowed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion. Further ordered, that appel-

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lant pay respondent, or her attorneys, $75 as and for attorney's fees and expenses on this appeal.

On April 28, 1906, the following order was made:

By the Court.—Ordered, that the mandate of the court in this action be changed so as to read as follows:

The judgment of the court below is modified by inserting the sum of $250 in place of $474.50 as condition of discontinuance, and as so modified is affirmed without costs, except that appellant pay the clerk's fees. Further ordered, that appellant pay respondent, or her attorneys, $75 as and for attorney's fees and expenses on this appeal.

GEREG, Appellant, vs. MILWAUKEE GAS LIGHT COMPANY, Respondent.

February 27—April 17, 1906.

Master and servant: Injury to servant: Failure to give warning of danger: Fellow-servants.

1. The rule that the master's duty to provide a reasonably safe place for his servants to work in cannot be delegated to another has no application to a case where the place is not inherently dangerous but is liable to be rendered unsafe, as by the sudden approach of a street car over which the master has no control.
2. The foreman of laborers digging a trench in the street for a gas main is a fellow-servant with such laborers, so that the employer is not liable for an injury to one of the men caused by the foreman's neglect to inform him that street cars were liable to pass or failure to station a watchman to give warning of their approach.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

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This is an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as a common day laborer digging a trench in which there was to be laid one of the defendant's gas mains on Downer avenue at its intersection with the defendant's gas main on Lake avenue. It appears from the map in evidence and is undisputed that Downer avenue runs in a north and south direction, that Lake avenue runs in a northeasterly and southwesterly direction, and that Sheridan avenue runs from Lake avenue, and at right angles with it, in a northwesterly direction. The point where the gas main to be constructed on Downer avenue was to be connected with the gas main on Lake avenue was on the westerly side of Lake avenue, a little northerly of the northerly line of Sheridan avenue projected easterly, and on the west side of Downer avenue, but near the middle thereof.

At the time of the injury the plaintiff and six other men were engaged in digging the trench in which the gas main was to be laid in Downer avenue near such proposed point of intersection, and the trench had then been dug to the depth of fifteen inches; and at the time the same was being dug or tunneled under some of the street car tracks on Lake avenue, where they turned onto Downer avenue, the men so at work were faced toward the south, the plaintiff being further to the south than any of the others, and where he would be struck by a passing street car unless he got out of the way. While so at work a street car suddenly and without being observed by the plaintiff came down on Downer avenue from the north and struck the plaintiff on the left side or hip and severely injured him.

That occurred about 2 o'clock on Sunday morning, July 26, 1903. The men had worked there the Saturday before, and on that day were told by the foreman to return to the work the next morning as soon as the cars stopped running, which was supposed to be about 2 o'clock a. m. The men,

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including the plaintiff, reached the place about 11 o'clock on that Saturday evening and lay down on the grass to rest before starting to work. The foreman arrived between 1 o'clock and 2 o'clock in the morning and after a little while ordered the men to start to work, and soon after the accident occurred. The work was being done under the supervision of the defendant's foreman, who had stepped away just prior to the injury, and was at the defendant's tool wagon, a block away, at the time of the accident, without stationing any one to keep a lookout during his absence. The early morning hour was selected for doing the work, so as to avoid the presence of the cars. Two cars passed on the track in question after the men were set at work—the one which struck the plaintiff; and another about fourteen minutes afterwards.

The foreman testified that the men requested him to set them at work because it was cold, and that when he directed them to begin work he told them, in the presence of the plaintiff, that there were a couple more cars to come down and it was all right to go to work; that they would watch the cars. On that Saturday afternoon the foreman was told by the defendant's superintendent to station one man to keep a lookout for coming cars; that there was nothing unusual about such instructions. The reason for giving such instructions, according to the testimony of the superintendent, was that when men were working close to the track with their heads in line with the street car it was dangerous, though not dangerous if a man was careful on his own account. There was evidence tending to prove that, prior to the accident, the plaintiff was not told that other cars or any car was liable to pass after they went to work that morning, and that he was not warned by the foreman or any one that a car was liable to pass after he so went to work.

At the close of all the testimony the court directed a verdict in favor of the defendant, and from the judgment entered thereon dismissing the complaint the plaintiff appeals.

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For the appellant there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild.*

CASSODAY, C. J. There is no claim of any want of care on the part of the defendant or its superintendent in selecting the foreman who had charge of the men at the time of the accident, nor in failing to instruct or direct him to conduct the work in a way to save the men, as far as possible, from being struck by passing street cars. There is no claim that the place where the men were at work was in itself inherently dangerous. It is conceded that the work in which the plaintiff was engaged at the time of the accident was being done under the supervision of the foreman. The only negligence claimed is that the foreman failed to inform the plaintiff that other cars were liable to pass at or about the time in question, or to provide a watchman to warn the plaintiff and other workmen of the approach of such car. The trial court directed a verdict in favor of the defendant, on the ground that such alleged negligence of the foreman, if any, was the negligence of the plaintiff's fellow-servant, for which the defendant was not liable.

The important question is whether the plaintiff and the foreman were fellow-servants at the time in question. As claimed by counsel for the plaintiff, the answer to the question does not depend upon the rank or grade of the negligent servant, but upon the nature or character of the act in the performance of which the injury was incurred. *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Kliegel v. Weisel & V. Mfg. Co.* 84 Wis. 148, 53 N. W. 1119; *Stutz v. Armour,* 84 Wis. 623, 54 N. W. 1000; *Wiskie v. Montello G. Co.* 111 Wis. 443, 449, 87 N. W. 461, and cases there cited; *Okonski v. Pa. & O. F. Co.* 114 Wis. 448, 90 N. W. 429. In several of these cases the negligent act complained of was the

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act of the foreman conducting the work. Thus, in one of the cases cited it was held:

"A foreman who personally conducts the blasting in a quarry is a fellow-servant of those who assist him in such work, and one of the latter cannot recover for injuries caused by the unexpected explosion, beneath the rock upon which he was at work, of powder which the foreman had negligently permitted to remain there after the partial explosion of a blast." *Wiskie v. Montello G. Co., supra.*

In another of the cases cited it was held that "the facts that the foreman had authority to hire, discharge, and direct the dock force, and was charged with the duty to see that the docks were so operated as to be safe, and to provide necessary lights, signals, and warnings, did not render him other than a fellow-servant of plaintiff while performing the specific act mentioned." *Okonski v. Pa. & O. F. Co., supra.*

As indicated, the place where the plaintiff was at work, at the time of the injury, was not of itself inherently dangerous. It was only made dangerous by the approach of the street car, over which the defendant had no control. Of course, it has often been held by this and other courts that it is the duty of the master to provide and maintain for his servants a reasonably safe place for the doing of their work, and that such duty is personal to the master and cannot be delegated to another. *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Hulehan v. G. B., W. & St. P. R. Co.* 58 Wis. 319, 17 N. W. 17; *S. C.* 68 Wis. 520, 32 N. W. 529; *McClarney v. C., M. & St. P. R. Co.* 80 Wis. 277, 280, 49 N. W. 963. But that principle has no application to a case where, as here, the place in itself was reasonably safe, but was liable to be rendered unsafe by the sudden approach of a car, which might have been foreseen and therefore avoided, had not the foreman failed to notify the plaintiff that other cars were liable to pass, or to provide a watchman to warn the plaintiff and other workmen of the approach of such car.

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As indicated in some of the cases cited, the mere fact that the negligent person happened to be such foreman did not prevent him from being the fellow-servant of the men. Numerous additional illustrations might be cited. . Thus it has been held that a foreman in a lumber yard and an employee therein are fellow-servants. *Hoth v. Peters,* 55 Wis. 405, 13 N. W. 219. So the foreman in raising and erecting a water tank and the workmen under him are fellow-servants. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269. So a watchman employed to guard a car-repairer is a fellow-servant of such repairer. *Luebke v. C., M. & St. P. R. Co.* 63 Wis. 91, 23 N. W. 136. So a brakeman on an approaching freight train was held to be a fellow-servant of workmen engaged in repairing the track, but who failed to give sufficient notice to those in charge of the train. *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668. See *Toner v. C., M. & St. P. R. Co.* 69 Wis. 197, 198, 31 N. W. 104, 33 N. W. 433, and cases there cited. We must hold that the plaintiff in this action and the foreman in charge of the men were fellow-servants, and hence that the verdict was properly directed in favor of the defendant.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

LONG, Appellant, vs. CITY OF NEENAH, Respondent.

February 26—April 17, 1906.

Municipal corporations: Liability for injuries by mob: Notice of threats, etc.: Negligence of person injured.

1. Under secs. 938, 939, Stats. 1898 (giving a right of action against a city for injuries inflicted by a mob, provided the person injured shall have immediately notified the mayor of the city after being apprised of any threat or attempt to injure him by

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any mob), the notice must be given by or on behalf of the person claiming damages; and a notice given by an employer, not on behalf of its employees, of the likelihood of mob violence on account of a strike, does not inure to the benefit of the employees.

2. The evidence in this case, although it shows that plaintiff and others had been jeered at on the street and called "scabs" by crowds, who also said "we will knock your block off," etc., is *held* not to show that he had been apprised of any threat or attempt to injure him by the mob which met and assaulted him on his return to defendant city in the nighttime after an absence of two or three days.

3. Evidence showing, among other things, that plaintiff, a nonunion man, left his place of employment in the nighttime and went to and from the railroad station unaided and unguarded, is *held* not to show that injuries inflicted upon him by a mob were caused by his negligence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The complaint alleges, in effect, that this action is brought against the city to recover damages sustained by the plaintiff while a resident of the city and in the employ of Kimberly & Clark Company as a workman at the Badger Mills, so called, in said city, on the morning of July 5, 1904, at said city, by being set upon by a riotous mob, consisting of the six persons therein named and other persons unknown to the plaintiff; that such persons were then and there assembled in a violent and tumultuous manner with the common purpose to do an unlawful act, to wit, to terrify the plaintiff and other persons, and by terror and violence to prevent the plaintiff and other persons from aiding in the operation of said mills of said company in said city; that the plaintiff was then and there by such mob beaten, cut, bruised, and injured, and the said injuries were so inflicted upon him by said mob for the purpose of terrorizing, intimidating, and preventing the plaintiff and other persons from serving said company in the running of said mills; that the plaintiff tried to escape from said mob and avoid such injury, but was unable to do so; that such

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injuries were so inflicted upon the plaintiff against his will and without any fault or neglect on his part; that no opportunity was given to the plaintiff to notify the mayor of the city or the sheriff of the county or any other officer of the city or county of the threatened injury after he became apprised of the threat or danger thereof; that such attack was made on the plaintiff without notice, and after it was apparent to the plaintiff that such attack was to be made he had no opportunity to avoid such injuries or to get aid from any person able or willing to prevent such injuries; that such injuries so inflicted did great bodily harm to the plaintiff and caused him great pain and injury, to his damage in the sum of $2,000. The city answered by way of admissions, denials, and counter allegations. At the close of the testimony on the part of the plaintiff the court granted a nonsuit, and from the judgment entered thereon the plaintiff appeals.

For the appellant there were briefs by *Hooper & Hooper*, and oral argument by *Moses Hooper*.

J. Mulloy and *F. C. Stewart*, for the respondent.

CASSODAY, C. J. It appears from the undisputed evidence that the plaintiff left Neenah, where he had been at work for some time, on Saturday evening, July 2, 1904, and went to Chicago, and returned therefrom to Neenah a little after 3 o'clock on the morning of Tuesday, July 5, 1904, where he was met at the depot by a riotous mob and by them was beaten, bruised, and pounded cruelly. While the fact is involved in this controversy, yet we are not here called upon to consider the liability or punishment of such offenders. The plaintiff is here seeking to hold the city liable for the damage so inflicted upon him by the mob. It is well settled that at common law a municipal corporation is not liable for damage done by mobs within its limits either to persons or property. 20 Am. & Eng. Ency. of Law (2d ed.) 1206; 2 Dill. Mun. Corp. (4th ed.) § 959. The liability of the defendant to the

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plaintiff in this action, if any, is purely statutory. Our statute provides, in effect, that "whenever any property . . . shall be destroyed or injured by or in consequence of any mob or riot, the city . . . in which such property is situated shall be liable to the owner thereof for the damages so sustained by him." And in like manner a remedy in law is thereby "given against such city . . . for any bodily harm or injury so sustained by any person." Sec. 938, Stats. 1898. But the liability so prescribed is limited by the next section, which, omitting what is not applicable here, declares that:

"No person shall be entitled to recover under the provisions of the preceding section when such . . . injury to his . . . person was occasioned or in any manner aided, sanctioned or permitted by him or caused by his negligence, nor unless he shall have used all reasonable diligence to prevent the same, and shall have immediately notified the mayor of the city . . . after being apprised of any threat or attempt . . . to do harm or injury to his person by any such mob or riot." Sec. 939, Stats. 1898.

The validity of such statutes is not questioned. No recovery can be had unless the right of action is given by the statute, nor without complying with the terms of the statute. It has been held under somewhat similar statutes that, although such statutes were penal in their nature, still they must be liberally construed, because they were also remedial. *Allegheny Co. v. Gibson,* 90 Pa. St. 397. Certainly, they must be fairly construed. "Even penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature." *State v. Shove,* 96 Wis. 1, 9, 70 N. W. 312, and cases there cited.

The principal ground of defense is that the plaintiff, "*after being apprised* of any threat or attempt . . . to do harm or injury to his person by any such mob or riot," did not "immediately notify the mayor of the city," as required by the section quoted. It is claimed on the part of the plaintiff that the written notice given to the mayor by the Kimberly &

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Clark Company about two weeks before the injury complained of, inured to the benefit of the plaintiff. But as we read the statute the notice required must be given by or on behalf of the person claiming damage. Thus, in New York, under substantially the same statute, where the property destroyed belonged to several tenants in common, it was held that such of the tenants as had knowledge of the threats several days before the injury, but failed to notify the sheriff, could not recover, but that such of the tenants as "had no personal knowledge of the threats were entitled to recover." *Loomis v. Oneida Co.* 6 Lans. 269. In the case at bar it is frankly admitted that the plaintiff gave no notice. So the question is whether he knew facts which required him to give notice. In construing such statute a New York court held that:

"The statute should be so construed that if a party is informed of a threat and have time to notify the sheriff so that he can take all legal means to protect the property, then the omission to give the notice is fatal." *Schiellein v. Kings Co.* 43 Barb. 490.

In a later case in that state it was held that:

"The provision of the act requiring notice to be given to the mayor of the city or sheriff of the county after the owner of property has been *apprised* that a threat or attempt has been made to destroy or injure the same by any mob or riot, necessarily contemplates that a sufficient period of time shall intervene between the threat or attempt and the execution of it to admit of the notice being given." *Moody v. Niagara Co.* 46 Barb. 659.

In a later case in the court of appeals in that state it was held that such "notice to the public officers will not be required where the party injured had no information in respect to which to give the proper notice." *Ely v. Niagara Co.* 36 N. Y. 297. In a still later case it was "held that the fact that the original purpose for which the crowd had assembled, to wit, to see the fire, was a lawful one, did not con-

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stitute a defense, as they had subsequently united in unlawful conduct and wrongfully broken into the plaintiff's store; that he was entitled to recover for the goods taken away by the mob, as well as for those destroyed upon the premises; that he was not under the circumstances of the case bound to notify the mayor or the sheriff of the threatened danger." *Solomon v. Kingston,* 24 Hun, 562; *S. C.* affirmed, 96 N. Y. 651. From these adjudications, as well as the language of the statute, the plaintiff was only required to notify the mayor of any threat or attempt of the mob or riot to do him personal harm or injury, after being apprised of the same.

From the evidence before us it is manifest that there was no opportunity, after the plaintiff returned from Chicago on the morning of July 5, 1904, and before the injury, to notify the mayor that the mob was then present threatening him with personal harm or injury. Whether there was any threat or attempt by any mob or riot to do the plaintiff personal harm or injury before he went to Chicago does not clearly appear from the evidence. The plaintiff testified to the effect that he went to work for the company June 13, 1904; that he was then told by the company that there was liable to be a walkout and they wanted new men to fill the places; that until June 20, 1904, the men employed took their meals at the Russell House, a big block away from the Badger Mill where they worked; that such employees were all nonunion men; that they would go from the mill to the Russell House in crowds of four to six; that during that week there was always a crowd on the street, apparently made up of union men and their sympathizers, who would jeer them and call them vile names, such as "scabs," "we will get you," "we will knock your block off," and the like; and on one occasion during that week two of the boys who worked in the mill were knocked down, and the plaintiff for a moment considered himself in danger; that he did not recognize any of the mob at the depot as the same individuals he had seen around the

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Russell House during the week mentioned, but they seemed to be connected with the same enterprise; that from June 20, 1904, to July 2, 1904, when the plaintiff went to Chicago, he and the other nonunion men at work for the company took their meals in the mill. We find no evidence in the record that before the plaintiff went to Chicago he had been "apprised of any threat or attempt . . . to do harm or injury to his person by" the "mob or riot" which met him at the depot on his return from Chicago.

Counsel for the defendant also contends that the injury to the plaintiff was "caused by his negligence" in leaving the mill alone and going to and from the depot unaided or unguarded. But we fail to find any evidence in the record tending to prove, much less conclusively proving, that the injury was caused by his negligence, or that he was chargeable with a failure to exercise "reasonable diligence to prevent the same." In fact, there is no evidence of misconduct on the part of the plaintiff.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

KERWIN, J., took no part.

HEATHCOCK, Administrator, Respondent, vs. MILWAUKEE-PLATTEVILLE LEAD AND ZINC MINING COMPANY, Appellant.

February 27—April 17, 1906.

Master and servant: Assumption of risk: Promise to remove danger: Reasonable time for fulfilment.

1. A servant who, in reliance upon the master's promise to make repairs or remove a danger, continues in the service for a longer time than is reasonably necessary for the fulfilment of such promise, assumes the risk.

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2. Plaintiff's intestate, whose duties required him to go frequently along a narrow passageway beside an unguarded mining shaft, the danger from which was obvious, threatened to quit work unless the opening of the shaft was guarded, but was induced to continue at his work by the assurance of defendant's superintendent that the place would be fixed in a short time. Thereafter, though no guard was erected, he continued at his work for seven days, when he fell down the shaft and was killed. An abundance of suitable materials was at hand and the work of guarding the shaft could have been done in half a day by an unskilled laborer. *Held*, that deceased had assumed the risk.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This is an action to recover damages for the death of the plaintiff's intestate, which occurred June 11, 1903, while he was in the employ of the defendant, by falling down an open mining shaft 100 feet deep. The complaint, among other things, alleges, in effect, that it was a part of the duties of the deceased to take charge of the hoist and to keep the fires going under the boilers; that the boilers were located to the east of the main shaft about twenty feet; that the hoist was located over the shaft and about twenty feet above it; that the boilers and the shaft were inclosed in the same building; that the stairway led from the ground to the hoist; that the foot of the stairway led from a point a little west and north of the mouth of the shaft to the hoist on the ground above; that in going from the hoist to the boilers, and from the boilers to the hoist, in the discharge of his duties it was necessary for the deceased to pass very near to the mouth of the shaft; that June 11, 1903, there was no barrier or railing of any kind around or at the mouth of said shaft to protect the deceased from falling into the shaft when about his duties as such employee of the defendant.

Issue being joined and a jury trial waived, the court at the close of the trial of the case found as matters of fact, in effect:

(1) Prior to January 1, 1903, the defendant sunk a shaft,

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in size 5 x 6 feet, to a considerable depth, in the ordinary way of mining, until the rock and dirt taken therefrom, called the dump, had accumulated about the mouth of the shaft to the height of ten or twelve feet. It then became necessary to establish steam hoisting machinery, and in March, 1903, the dump was removed, leaving the mouth of the shaft level with the surface of the ground. A building or shed of considerable height was constructed about and over the shaft with a boiler and engine room adjoining, which building was narrow from east to west, the east side of it coming within three and one-half feet of the mouth of the shaft, and the west side of it within five or six feet from the mouth of the shaft. Above the shaft and twenty-four feet from the ground a landing platform was erected which was twelve feet square, in which a hole three and one-half feet square was cut directly over the shaft, through which tubs from the shaft could come and be placed upon a car by the side of the opening, which car was run from the landing platform along a tramway some thirty-five feet to the outside of the building, and the tubs there emptied. The space between the landing platform and the mouth of the shaft was open. The hoisting of the tubs was done by a steam hoist which was operated by a lever that was upon the landing platform, and the person in charge of the hoist operated the lever, and his assistant landed the tubs upon the car and ran them out upon the tramway and emptied them. It was the duty of the one in charge of the hoisting to go down as often as four times a day to keep the fire up under the boiler. The landing platform was reached from below by a winding stairway that started three or four feet from the mouth of the shaft, and the person who came down from the platform to go to the boiler room, after reaching the ground, had to go around the mouth of the shaft and pass on the east or west side thereof, and, on returning from the boiler room, he had likewise thus to go around the shaft to reach the foot of the stairway. The building, landing

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platform, and the hoist were completed in the manner described April 22, 1903, and thereafter everything taken out of the shaft or let down into the shaft was by the steam hoist.

(2) The mouth of the shaft when the mine was not being operated was covered by a double trap door, but while work was being done in the mine these doors were necessarily open. The half of the door on the south side, when open, lay over flat on the ground, and the north half went beyond the perpendicular and rested against the top of a ladder that came out of the north side of the shaft. On the east and west sides of the shaft, when the doors were open, there was nothing between the sheer edge of the shaft and the sides of the building.

(3) When these doors were open and the mine was being worked, the unprotected mouth of the shaft, especially in view of the limited space upon its east and west sides, was a dangerous place, and the defendant through its officers, in the light of attending circumstances, ought reasonably to have foreseen that, unless a guard curbing was put around the mouth of the opening sufficiently high to prevent a person from accidentally falling into the shaft as a natural and probable result of the absence of such guard curbing, a workman, whose duty it was to pass between the foot of the stairs of the landing platform and the boiler room, might probably fall down the shaft, which was 100 feet deep.

(4) The deceased was at the time thirty-three years of age, and had a wife and two children aged six and three years, who were dependent upon his labor for support, a good miner, and began work at this mine for the defendant in January, 1903, at $1.75 a day, and continued to work for the defendant at that place until June 11, 1903, when he was killed by falling into the shaft. He worked part of the time down in the mine and the remainder of the time above ground. After May 1, 1903, when he was working above ground, his place was upon the landing platform managing the hoist, and in-

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cidental to this employment it was his duty at least four times a day to go from that platform down the stairs by the course described to the boiler room to attend to the fire. Up to the time of his death he had been managing the hoist in all about fifteen days. About 10 o'clock of the forenoon of June 11, 1903, after having stated to his assistant that the next time he went to the boiler room he would bring up the clock that was there, he started to the boiler room, and that was the last time he was seen alive. He fell into the shaft with the clock, soon after, and was killed.

(5) The proximate cause of his death was the want of a guard around the mouth of the shaft.

(6) About seven days before he was killed the deceased told Stephens, the superintendent of the mine, that he wanted some protection put around the top of the shaft, that it was dangerous to a man going from the platform to the boiler room and back, and if this was not fixed he would look for another job. Stephens told him that he would have it fixed in a short time. Relying upon this assurance and induced to do so thereby, the deceased continued to work.

(7) From the time this promise was made until the deceased was killed was not an unreasonable length of time for him to work in the belief that the promise would be fulfilled, and he did not thereby waive the promise and assume the risk of the unguarded shaft.

(8) It would not have taken more than a half day's work to have properly guarded the shaft. The deceased had no right to put a guard around it, as that would have been outside of his business to meddle with any of the arrangements about that shaft.

(9) There was nothing in the testimony to show that at the time the deceased fell down the shaft he was not exercising ordinary care for his safety under all the circumstances, and the presumption is that he was at the time exercising such care.

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(10) Due notice of such death and that satisfaction therefor was claimed from the defendant was served on the defendant January 27, 1904.

(11) The damages sustained by the plaintiff for the benefit of the widow of the deceased are $3,000.

As conclusions of law the court directed judgment to be entered in favor of the plaintiff and against the defendant for $3,000 damages and costs to be taxed. From the judgment so entered the defendant appeals.

It also appears from the undisputed evidence that the deceased had worked at this hoist at least fifteen days in May and June, 1903, and during all that time he had exclusive charge of the hoist and of the engine and boilers; all the rest of the time from January 5, 1903, to June 11, 1903, he had worked down in the mine, going down into it and coming up out of it through the mouth of this shaft every day; that the conditions at the mouth of the shaft on June 11th were the same as they had continued to be, unchanged at least from April 22, 1903, and that all of such conditions were open to the view of any person in the building and particularly to a person coming down from the platform to the foot of the stairway near the northwest corner of the shaft; that in the same forenoon the deceased had made one trip down from the platform to the boiler house and returned before starting on the trip on which he met with the accident; that there was abundance of material suitable for making a barrier or protection around the mouth of the shaft, and the work of putting it up could have been done effectively in not to exceed half a day by an unskilled laborer; that it did not need a carpenter; that it would have been a very easy thing to construct such barrier, and any of the men around there could have done it themselves.

For the appellant there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

For the respondent there was a brief by *Levi W. Pollard*

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and *Smelker & Smelker,* attorneys, and *Aldro Jenks,* of counsel, and oral argument by *J. P. Smelker.*

CASSODAY, C. J. The facts are undisputed. The only controversy is as to inferences and conclusions to be drawn from admitted facts. The passageway from the foot of the stairs—three or four feet from the northwest corner of the open shaft—to the boiler room was close by the side of the open shaft. That opening was five feet one way and six feet the other way, and had been level with the surface of the ground from March, 1903, to the time of the accident. Such passageway between the west side of the opening and the building was less than six feet wide, and the passageway between the east side of the opening and the building was only three and one-half feet wide; and each of such passageways came to the sheer or perpendicular edge of the shaft. In going from the foot of the stairs to the boiler room it was necessary to pass over one or the other of such passageways. Which of the two the deceased passed over at the time of the accident does not appear. The conditions at the opening of the shaft appear to have been substantially the same from April 22, 1903, to the time of the accident. For fifteen days prior to his death it was the duty of the deceased, at least four times a day, to go from the foot of the stairs mentioned to the boiler room by one or the other of the passageways described. During the time the deceased worked down in the mine he went to his work down through the shaft in question and came from his work up through the same shaft. At the time of the accident he had necessarily become perfectly familiar with the situation at the mouth of the shaft. In fact, it was open and obvious to any person looking at it. The trial court was certainly justified in finding, in effect, that the space between either side of the open shaft and the side of the building was so limited and narrow as to be dangerous to a person passing over the same; and that in the light of the

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attending circumstances such danger ought reasonably to have been foreseen and guarded against by the defendant's officers. The movements of men along such passageways, under such circumstances, were necessarily attended with more or less hazard. A person passing over such a narrow space, with the open shaft 100 feet deep from two to four feet from him, was necessarily exposed to the hazard of a misstep, an unexpected jar, or a sudden diversion, which would be liable to terminate in death. The judgment in this case is based upon the failure to guard against such danger by the officers of the company. Such danger ought reasonably to have been foreseen by the deceased as well as the officers of the company. The trial court did not so specifically find, but, in the opinion filed in the case, it is stated that the danger of the unguarded shaft was obvious to the deceased, at least from the time the steam hoist was put in, April 22, 1903, and that such danger was one of the risks of the employment which he assumed, and that such assumption continued until seven days before his death, when he threatened to quit work unless the opening of the shaft was guarded, and the deceased was then assured by the defendant's superintendent that the place would be fixed. Thus it appears from the findings of the court that the deceased had known of the conditions at the mouth of the shaft, where he was at work daily, for more than forty days prior to making any complaint, and that for eight days of that time he had charge of the hoist, and during those eight days he passed over the dangerous places described, going to and coming from the boiler room, at least eight times a day. The court held that the deceased had the right to rely upon such assurance for a reasonable time and that during such reasonable time such assumption of risk was suspended, and that such danger to him was not so obvious and immediate that it could be said, as a matter of law, that to continue such work was inconsistent with reasonable prudence on his part. For the purpose of this appeal we assume that the trial court was

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justified in holding that the deceased had the right to rely for a reasonable time upon such promise of the superintendent without himself assuming the risk of the danger.

The question recurs whether the deceased was justified, under the circumstances, in relying upon such promise for the period of seven days. While the adjudications are not uniform, yet the better opinion, and the one most in harmony with the decisions of this court, is that the servant is justified in remaining only for such a time as is reasonably sufficient for the master to make the repair or remove the danger. Thus, it is held in a well considered federal case in the circuit court of appeals that:

"A master is liable for an injury to a servant, resulting from an obvious defect and known danger, where the servant relied on an express or implied promise by the master to make repairs, for such time as would be reasonably required to repair the defect, but no longer." *Detroit Crude-Oil Co. v. Grable,* 94 Fed. 73, 78, 36 C. C. A. 94.

So in Illinois it was held that:

"The reasonable time for which a servant is entitled to remain in service after his master's promise to repair defects or remedy dangerous surroundings is such time as would be reasonably sufficient for the master to fulfil his promise." *Illinois S. Co. v. Mann,* 170 Ill. 200, 48 N. E. 417. To the same effect: *Gunning System v. Lapointe,* 212 Ill. 274, 72 N. E. 393; *Dowd v. Erie R. Co.* 70 N. J. Law, 451, 57 Atl. 248; *Hough v. Railway Co.* 100 U. S. 213, 225.

Thus it was held by this court that if the servant "continues in the service for a time longer than it is reasonable to allow for the performance of the master's promise he will be deemed to have waived his objection and assumed the risk." *Stephenson v. Duncan,* 73 Wis. 404, 41 N. W. 337. So in a later case in this court it was said:

"When an employee notifies the master of a special risk, and objects to continuing the work under the existing condi-

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tions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employee is not presumed to assume such risk." *Erdman v. Illinois S. Co.* 95 Wis. 6, 12, 69 N. W. 993.

In a still later case it is said, in effect, that the unwillingness of an employee to continue work at his own risk with defective appliances "must be overcome temporarily by a promise to remove the danger within a reasonable time." *Yerkes v. N. P. R. Co.* 112 Wis. 184, 188, 88 N. W. 33.

The question to be determined, therefore, is whether seven days was more than a reasonable time within which to guard the open shaft and thus remove the danger. What is a reasonable time to remove a danger in any given case must, from the nature of things, depend upon the facts and circumstances of the particular case. What would be a reasonable time in one case might be very unreasonable in another case. This might be illustrated by reference to the facts in numerous cases which might be cited. In the latest Illinois case cited (*Gunning System v. Lapointe, supra*) it was held:

"The cases where a promise by the master to repair suspends the servant's assumption of risk are those where particular skill and experience are necessary to know and appreciate the defect and its danger, or where machinery or materials are used of which the servant can have but little knowledge."

This court has said that the principle that an employee is relieved of the assumption of the risk by the promise of the master to remove the danger is usually applicable "to machinery or tools which are found to be dangerously defective." *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376, 382, 60 N. W. 257. The distinction is pointed out in the *Erdman Case, supra. Stephenson v. Duncan, supra,* which was referred to and apparently relied upon by the trial court, came to this court on an appeal from an order overruling a demurrer to the

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complaint and the order was reversed on the ground that the complaint failed to state a cause of action in favor of the employee and against the master, who had promised to remove the danger about ten days prior to the accident. The plaintiff was employed in operating the defendant's shingle mill, which was alleged to be in an unsafe condition in that the saw was uncovered and projected over its frame partly across the narrow passageway along which he was obliged to go to tighten and loosen the belt. The removal of such danger might have required the readjustment of a considerable portion of the machinery in the mill and involved scientific skill and knowledge and required more than ten days to fulfil the promise; and yet this court said that the complaint might have been held to state a good cause of action had it not also alleged that "the defendant had ample time and opportunity, and was abundantly able, to repair and put in a safe condition the machinery and apparatus between the time the plaintiff informed him of its defects and the time when the plaintiff was injured, but neglected and failed to do so, as was his duty, for the protection of the plaintiff." And this court then said:

"This allegation fairly implies that the plaintiff continued his employment beyond the period of time within which he might reasonably expect the defendant would keep his promise and put the machinery in proper condition."

What was thus alleged in the complaint in that case by implication, is here established by the undisputed evidence in this case. The work of guarding the mouth of the open shaft was very simple and manifestly could have been effectively performed by an unskilled common laborer in not to exceed a half a day. There was abundance of materials suitable for constructing a barrier or protection around the mouth of the shaft, and any of the men around there in the employ of the defendant could easily have performed the work. We must hold that, after the defendant's unreasonable delay in removing the danger, the deceased must be regarded as having again

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assumed the risk of the employment, the same as he had during the forty days before he threatened to quit.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

STATE EX REL. DELEGLISE VS. GOODLAND, Circuit Judge.

March 20—April 17, 1906.

Change of venue: Prejudice of judge: Mandamus *to compel immediate action.*

Under sec. 2625, Stats. 1898, upon an application for a change of venue because of prejudice of the judge, the court has at least until the last day of the term at which such application was made to make the order changing the venue, and is not obliged to determine immediately whether he will order such change or call in another judge; and where it appears that the judge intends to comply with the law either by changing the venue or calling in another judge within the time provided by the statute, *mandamus* will not lie to compel him to act at once.

MANDAMUS to JOHN GOODLAND, Judge of the Tenth Judicial Circuit. *Writ quashed.*

For the relator there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.*

T. W. Hogan and *O. H. Foster,* for the respondent. [No brief on file.]

KERWIN, J. This is an application for a peremptory writ of *mandamus* to *Hon. John Goodland,* judge of the Tenth judicial circuit, to compel him to change the venue in two actions pending in his court in which the relator is a party. It appears from the return to the alternative writ that the relator, *Mary Deleglise,* is the owner of a large amount of property in the county of Langlade, and that on the 31st day

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of October, 1905, she commenced an action by the service of a summons against her daughter, Sophia E. Leslie, who formerly acted as her agent, for an accounting; that afterwards the defendant, Sophia E. Leslie, was summoned to submit to an examination under sec. 4096, Stats. 1898, to enable the plaintiff to plead. Thereafter application was made to the county court of Langlade county, on petition, for the appointment of a guardian for the care of the person and estate of the relator. After due hearing an order was made declaring the relator mentally incompetent, and an appeal taken from said order to the circuit court. After said appeal was perfected, and on the 9th day of January, 1906, an affidavit of prejudice was filed in the circuit court. An order was obtained staying all proceedings in the action by the relator against Sophia E. Leslie until the determination of the county court proceedings for the appointment of a guardian. On the 15th day of January, 1906, the relator obtained an order to show cause before the circuit court for Langlade county, returnable on the 18th day of January, 1906, why the order staying proceedings in the case against Sophia E. Leslie should not be reconsidered, modified, or dissolved. On the 18th day of January, 1906, and while said motion to dissolve the stay was pending, and before the same was heard or determined, and while counsel for defendant Sophia E. Leslie were then and there ready in open court to take up and argue said motion, the attorney for relator, plaintiff in said action, filed an affidavit of prejudice in the action against Sophia E. Leslie, and refused to argue the motion to dissolve the stay returnable at that time, and the court ordered that the application be denied until the stay of proceedings be vacated or disposed of. No issue was joined in either of these actions, and the same were not on the court calendar, and could not be placed thereon except by stipulation.

The return further shows that said circuit judge has not refused to change the venue in said actions, or either of them,

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and is ready and willing to change the venue in accordance with the settled rules of law and practice; that both of said cases are under advisement by the court for the purpose of determining whether a judge of some other circuit can or ought to be called in to try said cases; and that before the end of the term said judge intends to make orders granting the change in each action, unless another judge is procured to try said actions. The return further shows that the term of said court in Langlade county commenced on the 13th day of November, 1905, and its sessions were continued to the 19th day of January, 1906; that in accordance with the rules of court and ch. 6, Laws of 1905, said term does not end until the following term, which begins on the first Monday in May, 1906.

It is very clear from the foregoing facts, set up in the return, that the circuit judge delayed making orders changing the place of trial in these actions with a view of determining whether another judge could be called in to try the cases. This is obvious from the return. Without stopping to consider the question of the relator's right to a change of venue while the motion to set aside the stay of proceedings was pending, the court clearly, under the statute, had at least until the last day of the term at which the application was made to make the orders changing the venue in said actions. The court was not obliged under the circumstances to suspend all proceedings and immediately determine whether he would change the place of trial or call in another judge. Counsel in their brief say that in the motion in the guardianship matter the court announced that he would not call in another judge. But we find nothing in the return indicating any such determination on the part of the judge. On the contrary, it appears from the return that the judge intends either to change the place of trial in both actions or call in another judge to try them. Counsel further say that the motion in suit for accounting was denied. This statement is not war-

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ranted by the return. It shows, as heretofore stated, that the affidavit of prejudice in this case was filed on the day and at the hour when counsel were about to argue the motion to dissolve stay. The court denied the application only until the stay of proceedings on file should be vacated or disposed of. This, in connection with other portions of the return, very clearly shows that the court did not deny or intend to deny the change of venue, except pending the disposition of motion for dissolution of stay of proceedings, and that the court intended, before the end of the term, to grant the change or call in another judge. It is very evident that the court was acting and intending to act in an orderly and proper manner and with due regard for the rights of the parties. Upon the whole return it is very clear that the circuit judge has not refused to comply with the law, but on the contrary intends to do so either by changing the venue in these actions or by calling in another judge to try them within the time provided by the statute. Under such circumstances *mandamus* will not lie. *Baker v. State,* 86 Wis. 474, 56 N. W. 1088; *State ex rel. Spence v. Dick,* 103 Wis. 407, 79 N. W. 421; sec. 2625, Stats. 1898.

By the Court.—The demurrer to the return is overruled, and the writ quashed.

GERMAN NATIONAL BANK OF RIPON, Appellant, vs. PRINCETON STATE BANK, Respondent.

March 21—April 17, 1906.

Sales: Setting aside for fraud: Intention not to pay: Evidence: Question of law or of fact? Bills and notes: Action, tort or contract?

1. A sale of property cannot be set aside as fraudulent because of the mere fact that the buyer, not being asked, did not disclose his insolvency. There must also have been an intention on his part not to pay.

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2. The situation and circumstances of the buyer may be shown and may justify an inference that he could have had no reasonable hope of ever being able to pay, but had, rather, a definite purpose not to pay; but this inference is one of fact, not of law, and a finding of the trial court thereon will not be disturbed unless clearly against the preponderance of the evidence.
3. One who had applied to a bank for a loan, upon being informed that there were no available funds, suggested an exchange of paper and received from the bank the note of a third person, giving in return his own note for a like amount. *Held*, that this was in effect a purchase of the third person's note and a giving of his own note for the price, and was not a sale of his own note to the bank so as to be within the reason of the rule that when one selling a promissory note conceals the fact of the maker's insolvency the sale may be avoided.
4. The complaint in an action by one bank against another alleged that one L. had procured a note from plaintiff by fraud; that defendant had acquired the note without consideration and with knowledge of the fraud, and had collected it and converted the proceeds to its own use; and that because of the "fraud and conversion" plaintiff had suffered damage in the amount of the note with interest. There having been no original contract relation between the parties, the action is *held* to be one in tort.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover damages for the conversion of a promissory note of the face value of $2,500. Trial by jury was waived and the action tried by the court, which made findings substantially as follows: That the plaintiff was and still is a national banking corporation doing business at Ripon, and the defendant a state banking corporation doing business at Princeton, during the times covered by the transactions in question, and that Charles Cowan and James L. Stone were at said times, respectively, president and cashier of the plaintiff bank, and one J. E. Leimer was cashier, director, and owner of a majority of the stock in the defendant bank; that on or about October 10, 1903, it was discovered by the commissioner of banking of the state of Wisconsin that

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Leimer was short in his accounts, and that the *Princeton Bank* was carrying forged paper, and that on the 24th day of the same month the defendant bank was put into the hands of a receiver, and that on or about December 11th following the receiver was discharged and the defendant bank resumed its business; that on or about September 26, 1903, the said Leimer, personally and not as representing the defendant bank, applied to the plaintiff bank for a loan of $2,500 for his own use, and plaintiff bank being short of loanable funds made an exchange of paper with Leimer, sending to him the note of $2,500 against the Rush Lake Creamery Company in exchange for a note of Leimer of the same amount, payable on demand; that this arrangement was made by telephone between Leimer and Stone, in the usual course of business, without fraud or deceit on Leimer's part upon which the plaintiff relied; that in procuring such loan Leimer made no false or fraudulent representations, nor did he state to the plaintiff bank anything relating to any past or present fact that was material or that was relied upon by the plaintiff; that the loan was procured by Leimer, who was then in good repute and held in high esteem by all the bankers, and the plaintiff took his unsecured note without asking questions, relying upon his personal standing and reputation; that at the time of said transfer, and for some time prior, Leimer was insolvent, having lost large amounts of money in speculation, but that he did not at that time have any intention not to pay therefor; that immediately after said transfer Leimer discounted the Rush Lake Creamery note at the *Princeton State Bank,* for value, and the same was afterwards collected by the receiver of the bank during his receivership.

The court concluded from these facts that the plaintiff was not entitled to recover, and dismissed the complaint.

The exact facts as to the transfer of the note to Leimer appear undisputedly by the testimony of Mr. Stone, the cashier of the plaintiff bank, as follows: On September 26, 1903,

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Mr. Leimer, at Princeton, called up the *German National Bank,* at Ripon, by telephone. Mr. Stone answered the call, and Mr. Leimer said they were about to increase the stock of the Montello State Bank, and he wished to make a loan (Mr. Leimer was a stockholder in the Montello State Bank). Mr. Stone replied that the plaintiff bank was closely loaned up and unable to make any outside loans. In reply to this, Mr. Leimer suggested an exchange of paper. Mr. Stone then consulted Mr. Cowan, told him the conversation that he had with Leimer, and Mr. Cowan said that he thought an exchange could be made, and Mr. Stone stated that to Leimer over the telephone. As a result of the conversation the plaintiff bank sent on the $2,500 note of the Rush Lake Creamery Company to Mr. Leimer, and received in return Leimer's own note for $2,500, payable on demand. It appeared, also, that the Montello bank was not, in fact, about to increase its capital stock, but that the stock was only partly paid in, and that it had been determined to require payment in full. It further appeared that Leimer had lost large sums of money in grain speculation, and was indebted to his own bank in nearly or quite the sum of $40,000, and had forged notes to the bank to cover up his overdraft.

Plaintiff appeals from a judgment dismissing the complaint.

For the appellant there was a brief signed by *Carter & Pedrick,* attorneys, and a reply brief signed by *Olin & Butler,* of counsel, and oral argument by *J. M. Olin* and *S. M. Pedrick.*

For the respondent there was a brief by *Thompson, Thompson & Pinkerton,* and oral argument by *A. E. Thompson.*

WINSLOW, J. It is well settled that a sale of property may be set aside as fraudulent either (1) because it was induced by false and fraudulent representations which were relied upon by the seller, or (2) because of the existence of an un-

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disclosed intention not to pay on the part of the buyer. These are two separate and distinct wrongs: the first is complete without intent not to pay, the second is complete without false representations. Both may be present in a given case, but either is complete and actionable without the other. *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599.

Both grounds seem to have been urged by the plaintiff in the trial court in this case, but that court negatived the existence of actionable false representations in its findings, and its conclusions in this respect are so manifestly correct that no serious argument was made upon that proposition in this court. If it could be said under any theory that there was a false representation made by Leimer as to an existing fact, it conclusively appears that the plaintiff did not rely thereon in making the transfer of the note to Leimer, and hence this supposed ground of liability need not be considered.

As to the second ground, the law is settled that mere insolvency is not sufficient to prove intent not to pay; neither is a mere failure to disclose such insolvency when not interrogated. The buyer may hold his peace if he be not asked; otherwise the door of hope would be well-nigh closed to the struggling merchant whose liabilities exceed his assets. If there be an honest purpose to pay, undisclosed insolvency does not affect the validity of the transaction; there must also be the preconceived purpose not to pay. All this is conceded by the appellant, but it is contended that, if the facts are such that the purchaser could have no reasonable expectation of being able to pay, this is equivalent to a definite purpose not to pay, as matter of law. Following this legal postulate, it is argued with force that the situation of Leimer was so desperate when he took the note in question that he could have had no reasonable anticipation or hope of ever being able to pay, and hence that the court should have found the definite purpose not to pay as a legal conclusion from the facts. There are some authorities which give support to this conten-

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tion, notably *Talcott v. Henderson,* 31 Ohio St. 162; *Maxwell v. Brown S. Co.* 114 Ala. 304, 21 South. 1009; *McKensie v. Rothschild,* 119 Ala. 419, 24 South. 716; *Davis v. Stewart,* 8 Fed. 803; *Jaffrey v. Brown,* 29 Fed. 476. This court, however, has not adopted that rule. On the contrary, in the case of *David Adler & Sons C. Co. v. Thorp,* 102 Wis. 70, 78 N. W. 184, it was said by way of quotation from a New York authority:

"An honest, though abortive, purpose to continue business and pay for the goods is consistent with the vendee's own knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusion and unreasonable expectations."

There were also cited approvingly in the *Adler Case* the cases of *People ex rel. Ellis v. Healy,* 128 Ill. 9, 20 N. E. 692; *Burchinell v. Hirsh,* 5 Colo. App. 500, 39 Pac. 352; and *Ill. L. Co. v. Flynn,* 108 Mich. 91, 65 N. W. 519. In the first of these cases it is said that "it is not enough that the defendant knew himself to be insolvent and had no reasonable expectation of paying;" in the second it is said: "Reasonable expectation not to pay is not enough; there must be design not to pay;" and in the third it is said: "What constitutes fraud in such a case is the purpose of the buyer not to pay for the goods. This is not determined by what purpose some other less hopeful of success in his ventures might under like circumstances have entertained, but to constitute the purchase fraudulent on this ground there must have been an *actual* intent on the part of the purchasers to obtain the goods without paying for them." So, also, in *Watson v. Silsby,* 166 Mass. 57, 43 N. E. 1117, it is said that, "to constitute a fraud which will avoid the contract, there must be a *definite conscious* intent not to pay."

Thus it appears that the doctrine is well supported by authority, and we confess that it seems to us entirely reasonable. Were the rule otherwise, the honest hope of the optimist

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would be condemned as dishonest because a pessimist under the same circumstances would not have entertained it. Many a man of optimistic disposition, with youth and energy on his side, has honestly deemed that he could continue business and pay his debts under circumstances which to another of cooler blood would have seemed desperate if not hopeless, and has succeeded. The law permits him to do this without branding him as dishonest. Of course, the circumstances may all be shown, and their desperate character may well justify an inference that there was no honest hope of success, but rather a conscious intent to obtain property without paying for it; but this inference is one of fact, not of law. The trial judge so treated the present case, and held, as a conclusion of fact, that Leimer did not have the purpose not to pay when he obtained the note in question. Had he held the other way, we should have had no difficulty in affirming the holding; but, on the other hand, we cannot say, in view of the deference due to the trial court's conclusions of fact, that his holding was so clearly against the preponderance of the evidence that it should be set aside.

It is said that when one sells the promissory note of a third person, and conceals the fact of the insolvency of the maker, the sale may be avoided (citing *Brown v. Montgomery,* 20 N. Y. 287), and it is argued that the transaction before us was, in effect, the sale of Leimer's own note, and that the same principle should apply. We do not, however, regard the present transaction as the sale of a note by Leimer. In substance, he purchased the $2,500 note of the plaintiff, and gave his note for the purchase price, just as a merchant might purchase goods and give his note. The note was simply the evidence of his promise to pay his own debt, which was put in writing instead of being permitted to rest in parol.

Costs were taxed as in a tort action, and the appellant claims that the action is upon contract for money had and received, and hence that the taxable attorney's fees should have

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been limited to $25. The complaint charges the fraudulent procurement of the note by Leimer, the acquirement thereof by the defendant bank without consideration and with knowledge of the fraud, the collection of the same by the receiver and the conversion of the proceeds by him as receiver, the turning over of the assets to the defendant bank at the close of the receivership, a demand of payment with interest from the date of the conversion, and a statement that, because of the "fraud and conversion" aforesaid, the plaintiff has suffered damage in the sum of $2,500 with interest.

We regard the complaint as quite clearly stating a cause of action in tort. There was no original contract relation between the parties to this suit. Of course, the plaintiff could have waived the alleged tort and sued simply upon implied contract for money had and received, but when he sets forth fraud and conversion as the gist of his action, and says that by reason of the "fraud and conversion" he has suffered damage in the sum for which he claims judgment, we think it clearly appears that he sues to recover damages for the tort. The cases of *Rawson Mfg. Co. v. Richards,* 69 Wis. 643, 35 N. W. 40; *Van Oss v. Synon,* 85 Wis. 661, 56 N. W. 190; and *Casgrain v. Hamilton,* 92 Wis. 179, 66 N. W. 118, are all cases where there was a contract between the parties, and in all of them it was held that in such case, though conversion be alleged, the action would be deemed upon the original contract where the conversion was not charged to be unlawful, wrongful, or fraudulent. The distinction between those cases and the present case, where there was no original contract between the parties, is plain.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

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JOHNSON and others, Respondents, vs. SWANKE, imp., Appellant.

March 21—April 17, 1906.

Equity: Cancellation of written instrument: Adequacy of defensive legal remedy: Trial by jury: Fraud: Judicial discretion: Inconvenience from delay: Multiplicity of actions: Several actions on note: Sales: Rescission.

1. One who has a complete defense at law to any action which may be brought against him upon a written instrument cannot maintain an action in equity for cancellation of such instrument unless there are special circumstances making such defensive legal remedy inadequate to promote the ends of justice and afford complete relief.
2. The jurisdiction of equity is restricted in such cases in deference to the constitutional guaranty of the right of trial by jury, and such guaranty, liberally construed, determines the extent of the restriction.
3. The fact that the execution of the written instrument was induced by fraud is not, of itself, such a circumstance as would entitle the defrauded party to maintain the action for cancellation, since, where the legal remedy is adequate, a party is entitled to a jury trial in a case founded on fraud, the same as in any other.
4. Whether special circumstances exist in any particular case, rendering the legal remedy inadequate, so that the case is a proper one to be dealt with by equity jurisdiction, is, in the absence of precedents furnishing a certain guide, a matter of judgment; and the decision of the trial court thereon should not be reversed unless clearly wrong.
5. Mere necessity to await the pleasure of the holder of a void instrument to commence action thereon, though it may raise a presumption of annoyance or inconvenience to the party having a legal defense, does not raise a presumption of irreparable injury, and, in the absence of anything to show that the instrument has been or will be used as a basis for vexatious litigation, does not warrant an action for cancellation.
6. Although there are a number of makers of a note which is alleged to be void, each of whom may be sued separately thereon, this fact does not warrant an action for cancellation on the ground that it will prevent a multiplicity of actions.

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7. The fact that a note was given for the purchase price of a horse which the makers were induced by fraud to buy and which is useless and a continuing cause of expense to them, does not warrant an action for cancellation of the note in order that the matter may be speedily adjudicated. Having duly rescinded the contract they may, upon proper notice, sell the horse and reimburse themselves for their expenses, holding any balance for the parties entitled thereto.

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Plaintiffs' claim was this: February 13, 1904, defendants Keller and Klunt induced plaintiffs and defendants Heideman and Pryse to purchase of the former a horse, agreeing to pay therefor $3,000, according to the terms of a joint and several nonnegotiable, six per cent. interest, promissory note, dated February 12, 1904, which all of said persons, so induced, on the first mentioned day signed and delivered to said Keller and Klunt, in exchange for said horse. Said Keller and Klunt obtained such note by false and fraudulent representations to the makers, in relation to such horse, relied upon by them as being true.

The representations referred to were set forth in detail, coupled with appropriate allegations that they were false, and allegations as to the true character of the animal, to the effect that he was worthless for the purpose for which he was purchased.

Heideman and Pryse refused to join as plaintiffs, and were therefore made defendants. Immediately after discovering the true character of the horse it was tendered back to the sellers, and a return of the note demanded, but acceptance of the tender and likewise a return of the note were refused.

Defendant *Swanke* is now the owner and holder of the note. Unless restrained by the court he will sell the same. Defendants Keller and Klunt are insolvent, or their property consists wholly of personalty which could readily be sold, so

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as to readily prevent the collection of any judgment plaintiffs might obtain against them.

There was a prayer for an injunction preventing any transfer of the note pending the action; that a delivery thereof for cancellation be required; that judgment go against Keller and Klunt for the care and keep of the horse and, if delivery of the note were found impossible, for $3,000 as damages on account thereof; and that defendants further recover their costs.

Defendant *Swanke* demurred to the complaint for insufficiency and for that the plaintiffs' remedy was at law. The demurrer was overruled, and the demurrant appeals.

The cause was submitted for the appellant on the brief of *Max Hoffman* and *Kreutzer, Bird & Rosenberry,* and for the respondents on that of *E. L. & E. E. Browne.*

MARSHALL, J. The question for consideration on the appeal is this: Does the principle that equity only supplements legal remedies, making up for their infirmities, preclude one who has an adequate defense at law to an ostensibly valid, but in fact void, obligation in writing against him from having the use of equity jurisdiction, at his initiative, to quiet the controversy and obtain a cancellation of the instrument? In other words, must one so circumstanced await the pleasure of his adversary as to time and place of attack, and then vindicate his right by way of defense?

Here, according to the facts stated, the note is void at the election of the plaintiffs and, it being nonnegotiable, the defense thereto can be in no way prejudiced by a transfer thereof to another without notice of its infirmity, there being no element of estoppel, which element is necessarily under the control of the plaintiff to create or prevent. Whenever and wherever the holder of the paper may see fit to invoke a judicial remedy to enforce it, plaintiffs can successfully de-

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fend by alleging and proving the facts set forth in the complaint.

As an original matter it would seem that one ought not to be precluded from seeking aid of equity to avoid the menace of a prosecution on a void note, when he would necessarily suffer embarrassment and anxiety by having it outstanding against him till the holder might see fit to enable him to show its true character and obtain a judicial decree in respect thereto by way of defense. Most men would so tire of such a situation as to be constrained to buy their peace, rather than to have it postponed till such time as their adversary might see fit to attack. Anciently it was quite common for equity to interfere in such cases where the adverse claim was founded on fraud, without there being any other special circumstances. The subject will be found extensively discussed in the notes to sec. 914 (3d ed.) of Pomeroy's Equity, where it is said in effect that the American courts, contrary to the English system, have generally adhered to the negative of the suggested proposition; that without special circumstances equity jurisdiction cannot be invoked by way of attack to cancel an instrument to which there is an adequate defense at law. This is quoted from the opinion of CHRISTIAN, J., in *Wampler v. Wampler,* 30 Grat. 454, as a fair statement of the old and, in the judgment of the text-writer, the better doctrine:

"Courts of equity have an original, independent, and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it may be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requirements of justice. If a case of fraud be established, a court of equity will

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set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to effect them. These principles have now become axioms of equity jurisprudence."

He followed that, however, with a confession that the quotation was really contrary to the American doctrine; that there has been a practical surrender by courts in this country of a large part of the jurisdiction in equity as to matters referred to, formerly exercised. He stated the modern rule thus:

"The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and that the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete."

A reference to the authorities shows that the jurisdiction of equity in this country has been restricted as above indicated, in deference to the constitutional guaranty of the right of trial by jury. This court is in harmony therewith, as suggested by counsel for appellant, referring to *Matteson v. Ellsworth,* 28 Wis. 254, 256, and *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355, 364, 85 N. W. 432.

The yielding up of jurisdiction to entertain a suit to cancel an instrument in a case where it cannot be enforced because of grounds constituting a plain defense thereto at law, has not proceeded to any greater extent than the guaranteed right of trial by jury, liberally construed, seemed to demand. It is limited by the precedents to cases where there are no special circumstances rendering the legal remedy by way of defense inadequate. The following are but a few that might be referred to: *Teft v. Stewart,* 31 Mich. 367; *Springport v. Teutonia Sav. Bank,* 75 N. Y. 397; *Allerton v. Belden,* 49 N. Y. 373; *Farmington v. Sandy River Nat. Bank,* 85 Me. 46,

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26 Atl. 965; *Globe Mut. L. Ins. Co. v. Reals,* 79 N. Y. 202; *Venice v. Woodruff,* 62 N. Y. 462; *Erickson v. First Nat. Bank,* 44 Neb. 622, 62 N. W. 1078; *Johnson v. Andrews,* 28 Ga. 17; *Johnson v. Murphy,* 60 Ala. 288; *Huff v. Ripley,* 58 Ga. 11; *Black v. Miller,* 173 Ill. 489, 50 N. E. 1009; *Vannatta v. Lindley,* 198 Ill. 40, 64 N. E. 735; *Ada Co. v. Bullen B. Co.* 5 Idaho, 188, 47 Pac. 818; *Glastenbury v. McDonald's Adm'r,* 44 Vt. 450; *Ins. Co. v. Bailey,* 13 Wall. 616; *Home Ins. Co. v. Stanchfield,* 1 Dill. 426, Fed. Cas. No. 6,660; *Atlantic D. Co. v. James,* 94 U. S. 207, 214; *Cable v. U. S. L. Ins. Co.* 191 U. S. 288, 24 Sup. Ct. 74; *Ætna L. Ins. Co. v. Smith,* 73 Fed. 318.

In *Ins. Co. v. Bailey* the federal supreme court stated, tersely, what Mr. Pomeroy is pleased to call the American doctrine, thus:

"When a party, if his theory of the controversy is correct, has a good defense at law to a purely legal demand, he should be left to that means of defense, and he has no occasion to resort to a court of equity for relief unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied that preventive remedy."

In *Ada Co. v. Bullen B. Co., supra,* the court phrased the rule thus:

"A court of equity will not interfere to decree the cancellation of a written instrument unless some special circumstance is shown to exist establishing the necessity of a resort to equity to prevent irreparable injury."

With very little variation from that, the same doctrine will be found declared in each of the cases cited. The Illinois court, in *Black v. Miller,* stated the matter thus:

"Where a party alleging himself to be injured by the existence of a written instrument has a complete defense against it in an action at law, he cannot ask a court of equity to require its surrender and a cancellation unless the remedy by defense relied on is inadequate to promote the ends of justice and afford complete relief."

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The authorities are not all one way on this subject, as will be apparent from an examination of the opinion in *Wampler v. Wampler,* 30 Grat. 454, authorities in Michigan some of which will be hereafter referred to, and others, many of which will be found referred to in the note to sec. 914, Pom. Eq., heretofore cited, and by further reference to secs. 700, 700*a,* Story, Eq. Jur. However, the weight of authority, it is believed, is as indicated. In any event, this court, as we have seen, has adopted the so-called American doctrine.

Now what will satisfy the call for special circumstances, in a case of this sort, enabling the injured party to invoke equity jurisdiction, cannot be determined by any rule so phrased as to exactly fit all situations. Each case must necessarily stand, to a great extent, on its own particular facts. The rule covering the subject cannot, in the very nature of things, go further than to require that such circumstances must be of a nature which would cause some irreparable loss to the party if he were not permitted to have the use of equity jurisdiction, either because the loss would be of a character not susceptible of measurement in money with any reasonable degree of accuracy, or, if so measurable, the damages would not be recoverable for some reason, or the legal remedy, if none other were usable, would or might probably lead to a multiplicity of actions, or circumstances otherwise locating the cause of action fairly under some one of the recognized heads of equity jurisprudence.

Suggestions may be found, in some cases, that fraud of itself satisfies the call for special circumstances (see *Springport v. Teutonia Sav. Bank, supra,* and *Globe Mut. L. Ins. Co. v. Reals, supra*); and it is uniformly so held in Michigan (*John Hancock Mut. L. Ins. Co. v. Dick,* 114 Mich. 337, 72 N. W. 179; *Mactavish v. Kent Circuit Judge,* 122 Mich. 242, 80 N. W. 1086). Those cases are out of the current, so to speak, however. They seem to be inconsistent with the general doctrine which our court is inclined to firmly adhere to,

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that a party is entitled to a jury trial in a case founded on fraud, the same as in any other, the legal remedy being adequate. In most of the cases cited, where it is held that equity jurisdiction is not available, the element of fraud was present. That is true as to each of the federal cases, and also as to each of the cases in this court; particularly in *Matteson v. Ellsworth,* 28 Wis. 254.

Manifestly, whether a case does or does not satisfy the test as to whether equity jurisdiction should be afforded, is not always easy to determine. It must often be a matter of judgment, and necessarily so, where the precedents are not sufficiently clear to furnish the court a certain guide. In the latter situation the decision of the trial court should not be disturbed unless manifestly wrong. Where no certain guide exists as to any particular situation, by way of the general rule illustrated by precedents, as to whether it should be dealt with by equity jurisdiction, the matter in a large degree must be solved by the exercise of judicial discretion. In *Springport v. Teutonia Sav. Bank, supra,* the court said in respect to the matter: "The propriety of affording equitable relief . . . rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." See, also, *Calhoun v. Millard,* 121 N. Y. 69, 77, 24 N. E. 27. That is stating it pretty strongly. The language should be read with the limitations above suggested. It cannot well be said, either, that the element of fraud entitles the wronged party, as matter of right, to the use of equity jurisdiction, where his defense at law would be full and adequate, nor that in such circumstances it is a matter within mere judicial discretion, in the ordinary sense of that term, to permit the use of such jurisdiction or deny it. It is a matter to be determined by judgment as regards whether there are special circumstances rendering the legal remedy not wholly adequate to the case. In that field the trial court must necessarily be allowed a pretty wide scope for the exer-

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cise of discretion. The result should not be reversed, unless clearly wrong, but where the special circumstances are found to exist, then the use of equity jurisdiction should be regarded as matter of right. In holding to one of the two criticised theories, the guaranteed right of trial by jury was overlooked to the extent of exempting, without warrant, it seems, a class of cases where the right is susceptible of being fully vindicated at law; and in holding to the other such theory, the guaranty as to such class is held to be subservient to the mere favor of the court as to whether it shall or shall not be enjoyed.

In the light of the above rule and illustrations of its application, we are unable to perceive why plaintiffs have not a plain and adequate remedy for the wrong complained of by way of defense at law, in case of their being sued on the note; and we are likewise unable to perceive how there can be such danger by relying on that remedy as to warrant displacing the right of trial by jury to enable them to have the use of equity jurisdiction.

If it were suggested that such jurisdiction only can compel the surrender of the instrument for cancellation, that is met, first, by the authorities that even where the old practice prevails, as to law and equity, the latter is not usable merely to compel the cancellation of an apparently good but in fact void obligation (*Black v. Miller,* 173 Ill. 489, 50 N. E. 1009); second, that mere necessity to await the pleasure of the holder of the instrument to commence action, though it may raise a presumption of probable annoyance and inconvenience, does not of irreparable injury in a pecuniary sense. Equity jurisdiction is not open to any one on the ground of mere convenience. *Vannatta v. Lindley,* 198 Ill. 40, 64 N. E. 735.

The fact, if it be a fact, as suggested in the vigorous note to sec. 914 of Pomeroy, that in such cases "justice could be administered, and the rights of both litigants protected far better by the trial judge than by leaving everything to the rough and ready justice of an ordinary jury," would furnish

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no warrant for opening the doors of equity in cases where they are closed by the constitutional guaranty as to the right of trial by jury; otherwise there would be but very little basis for any limitation to the displacement of such right by equity. The quoted language involves an attack upon the constitutional system rather than upon the practice under it. However, we are not ready to admit that the time-honored idea is wrong, that the rights of parties as to matters of fact can best be entrusted, for protection, to the judgment of a jury, guided as to the law by a careful and intelligent judge.

There is nothing alleged which can bring the case under that head of equity relating to the prevention of a multiplicity of suits. That does not apply merely because each of several parties jointly and severally liable may be independently sued. It applies where one party may be sued several times in relation to the same subject matter in its entirety, or in respect to some element or elements thereof. Here there is but one instrument. The right under it, whatever it may be, can only be asserted as to any defendant in one action. This phase of the case will be found treated in several of the authorities cited.

The idea that delay of opportunity for respondents to obtain a judicial remedy, in case of their being compelled to wait upon the pleasure of appellant to bring suit, and possible prejudice to the former by the latter being left at liberty to choose his own time and place for attack, and that such considerations should appeal successfully to equity, is met in the cases cited. The statute furnishes ample opportunity for the perpetuation of evidence; which is an answer in part (*Springport v. Teutonia Sav. Bank,* 75 N. Y. 397), and the mere possible prejudice mentioned is not deemed sufficient (*Vannatta v. Lindley, supra*), which completes the reply. If there were facts alleged to the effect that the instrument has been or will be used as a basis for vexatious litigation, the case might be different.

It is suggested that since the horse is a useless animal, his

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being left on respondents' hands has been, and will continue to be, a cause of prejudicial expense to them, giving rise to a peculiar necessity for the matter complained of to be speedily adjudicated, since Keller and Klunt are irresponsible except as to personal property, which they can readily dispose of and thereby defeat any judgment respondents may obtain against them. That does not indicate imminent danger of irreparable injury, first, because it cannot be anticipated that Keller and Klunt will so attempt to defeat a judgment, and, second, because respondents can by taking the proper course at any time liquidate their damages caused by necessary care and keep of the horse to the extent of its value, provide for compensation therefor, and at the same time avoid the necessity of incurring further expense in respect to the animal. Having fully rescinded the contract by a proper offer to return the animal and repudiation of the contract of sale, they need not then abandon the horse nor keep him on expense; they can, after giving the owner full opportunity to take him away and proper notice, sell it, exercising reasonable care to secure the best price fairly obtainable, using the proceeds to reimburse the expenses incurred in taking care of it, and holding the balance for the use of the party or parties entitled thereto.

So there is nothing alleged expressly or by reasonable implication, which will warrant affording to respondents the jurisdiction of equity. So far as appears, they must rely upon their defense at law. Such being the case, the court could not, by any proper exercise of discretion, entertain the complaint. The demurrer should have been sustained.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to sustain the demurrer, and for further proceedings according to law.

CASSODAY, C. J., took no part.

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THE STATE and another, Respondents, vs. WISCONSIN CENTRAL RAILROAD COMPANY, Appellant.

March 21—April 17, 1906.

Railroads: Restriction of speed of trains: Forfeitures: Statutes construed: Joinder of parties: Reasonableness of regulation.

1. **Sec. 1809*a*, Stats. 1898, prohibits the running of trains or engines faster than fifteen miles an hour in cities and villages in which gates are maintained as therein provided; but sec. 1809 still prohibits a greater speed than six miles an hour in all other cities and villages, and a violation of sec. 1809 subjects a railroad corporation to the forfeiture prescribed in sec. 1819.**
2. **In an action to recover a forfeiture under sec. 1819, Stats. 1898, the person prosecuting and alleged to be entitled to one half the forfeiture may join with the state as party plaintiff, under sec. 3297.**
3. **Legislative restriction of the speed of railroad trains to six miles an hour in cities and villages is not unreasonable.**

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Appeal from order overruling demurrer to complaint by the state of *Wisconsin* and *Charles F. Crane* as plaintiffs, which alleges that defendant operates its railroad through the village of Weyauwega and across a traveled street at grade, and that no gates are maintained; that defendant is indebted to the plaintiffs in the sum of $5,500 according to the provisions of secs. 1809, 1819, Stats. 1898, by reason of having on eleven specified occasions, by its officers, agents, and servants, run trains across said street at rates exceeding six miles per hour, such rates varying on the different occasions from nine and one-half miles on one to forty-five miles on another. Judgment for the $5,500 and costs is demanded. The demurrer asserts three grounds: (1) That the plaintiffs have not legal capacity to sue; (2) that several causes of action have been

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improperly united; and (3) that the complaint does not state facts sufficient to constitute a cause of action.

For the appellant there was a brief by *Howard Morris* and *Thos. H. Gill,* and oral argument by *Mr. Gill.*

The *Attorney General,* for the respondents.

DODGE, J. Appellant's principal contention seems to be that sec. 1809*a,* Stats. 1898, must be considered as an amendment and, therefore, a part of sec. 1809, Stats. 1898, so that the only penalty ascribable to any disobedience of either is that denounced by sec. 1809*a* against any violation "of the provisions of this section." This view is erroneous. As decided in *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837, sec. 1809, prohibiting running of trains through any city or village faster than six miles per hour, stands as it always had prior to the enactment of what is now sec. 1809*a,* except that, since the two statutes are generally *in pari materia,* the latter and more specific must be deemed to have carved out of the broader field covered by sec. 1809 that particular situation with which sec. 1809*a* deals, namely, a city or village where gates are maintained by order of the city government, and to contain the whole law on that subject. *Nolan v. Milwaukee, L. S. & W. R. Co.* 91 Wis. 16, 64 N. W. 319. The result is that sec. 1809 still prohibits a rate exceeding six miles an hour in all cities and villages, except those where gates are so maintained. The offense of running trains at a rate exceeding fifteen miles per hour in gated municipalities is a wholly distinct and separate one, with which alone sec. 1809*a* deals, and upon which is imposed the penalty expressed in that section. It results, of course, that disobedience of the prohibition declared in sec. 1809 is subject to the penalty denounced by sec. 1819, namely:

"If any railroad corporation, its officers, agents or servants shall violate or fail to comply with any of the provisions of this chapter for which no forfeiture is otherwise specially

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provided such corporation shall, for each and every such violation or failure, forfeit not less than fifty nor more than five hundred dollars, one half to the person prosecuting, and in addition be liable to the person injured for all damages sustained thereby."

Sec. 3297, Stats. 1898, expressly authorizes the joining with the state of the person entitled to any portion of the forfeiture, as the plaintiff *Crane* is alleged to be, under the provisions of sec. 1819. This view, of course, disposes of the further contention that the penalty denounced by sec. 1809*a* can be recovered only in an action in the name of the state alone, and that, since such penalty is only made "additional" to damages for a private injury, it cannot be recovered in absence of allegation and proof of such private injury.

A contention that a restriction by the legislature of the rate of railroad trains to six miles an hour in cities and villages is unreasonable cannot be sustained. That question is obviously within the field of legislative discretion in enacting police regulations. Nor can we discover absurdity in imposing a smaller penalty on running trains more than fifteen miles per hour over guarded street crossings than at six miles an hour where there are no such protections. If the precautions against access by the street to the railroad tracks were perfect, doubtless the legislature might forego all restraint of speed or penalty therefor.

By the Court.—Order affirmed.

CASSODAY, C. J., took no part.

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NELSON and another, Respondents, vs. CAMPBELL & CAMERON COMPANY, Appellant.

March 21—April 17, 1906.

Judgment: Former recovery: Extent: Amendment of pleading: Damages for cutting timber.

1. **Both court and counsel having tried the case on the theory that the question of estoppel by former recovery was properly within the general issue raised by the pleadings, on appeal the answer is regarded as amended accordingly.**
2. **In a former action against one C., plaintiffs demanded damages for the cutting and removal of all the timber from certain land, and it was undisputed that all the timber had been removed by a corporation to which C., claiming to be the owner of the land, had sold the timber. The case was submitted to the jury on the theory that, if plaintiffs were entitled to recover, they were entitled to recover for all the timber shown to have been taken from the land. The jury found for plaintiffs, assessing the damages, and plaintiffs had judgment therefor, which was paid. *Held*, that plaintiffs cannot now recover damages from said corporation for timber removed by it before the date of the alleged sale, since full damages for the removal of all the timber were included in the former recovery.**

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to recover damages upon the ground that defendant's agents and servants cut and removed timber from the plaintiffs' land, the northwest quarter of the northeast quarter of section 2, township 24, range 12, Waupaca county. Plaintiffs allege that they are now and since 1881 have been the owners of this land, and that defendant's agents and servants, between the 1st day of December, 1897, and the 3d day of February, 1899, wrongfully cut and removed timber therefrom, to the plaintiffs' damage. The defendant denies that plaintiffs owned the timber, and denies that its agents and servants cut and removed it as charged.

It appeared upon the trial of the case that plaintiffs, in

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January, 1901, brought an action against one Charles Churchill to recover damages from him for the cutting and removal of the timber from this land, upon the ground that he, acting as owner under a tax deed from Waupaca county, had authorized this defendant to cut and remove the timber from this land. The suit against Mr. Churchill was prosecuted to judgment and resulted in a recovery of damages and costs by the plaintiffs. Such judgment was fully paid and was satisfied by plaintiffs before the commencement of this action. The record of the Churchill case, including the evidence and the court's charge to the jury, was offered and received in evidence in this case. From this it appears that Churchill claimed to own this land after 1896 under a tax title from Waupaca county, and as such owner, on February 3, 1899, sold to defendant the standing timber on the land. It also appeared that Churchill did not contest the claim that the defendant in this action, under the authority he had given it, cut and removed the timber from the land. The record and evidence adduced upon the trial of the Churchill case also show that these plaintiffs, in that case, claimed that all of the timber which had been cut and removed from this land had been cut and removed by the defendant's agents and servants under the authority from Churchill so proven, and that upon the trial of that case they demanded damages in full for the removal of all of the timber, and that the case was submitted by the court to the jury upon the theory that, if they found plaintiffs were entitled to recover, they were entitled to recover the market value of all of the timber shown by the evidence to have been taken from this land. It is now claimed that the recovery in the Churchill case was limited to such damages as this defendant committed under the bill of sale of the timber dated February 3, 1899, the alleged authority from Churchill.

The trial court submitted the issues raised by the pleadings in the case to the jury upon the evidence offered, and re-

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stricted recovery to whatever timber the jury found under the evidence had been removed by defendant during the winter season of 1897–98. The jury returned a verdict for plaintiffs and awarded damages in the sum of $560. Judgment for this amount and for costs was accordingly entered. This is an appeal from such judgment.

For the appellant there was a brief by *Phillips & Hicks,* and oral argument by *E. R. Hicks.*

For the respondents there was a brief by *H. J. Severson,* attorney, and *McFarland & Murat,* of counsel, and oral argument by *C. D. McFarland.*

SIEBECKER, J. From the foregoing statement of the case it appears that the plaintiffs claimed the right to recover damages for the removal of the timber from the land owned by them, upon the ground that they had not recovered any damages for such trespass in their action against Churchill theretofore prosecuted to judgment. The charge in the complaint is a general one of trespass for removal of timber from plaintiffs' land between certain dates. The record of the trial shows that after plaintiffs had offered their evidence, tending to show that defendant had removed timber between the dates as alleged, the defendant then suggested to the court that it would defend upon the ground that the timber for which plaintiffs now sought to recover was, upon the facts adduced in evidence, included in the recovery in the action against Churchill, and that it had been fully paid for by payment of the plaintiffs' judgment in that case. At this point in the trial plaintiffs' counsel admitted payment to them of the judgment in the Churchill case, and informed the court that they did not claim the right to recover damages for the taking of timber from their premises for which recovery was had in the Churchill action, and they called for a ruling of the court to determine the extent of the recovery in the Churchill suit. The court thereupon ruled that the recovery in the Churchill

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case was limited to a recovery for the timber removed after February 3, 1899, under the pretended authority of Churchill, given by the bill of sale bearing this date, and that the damages now claimed were not included in that recovery. This ruling was based upon the record and the evidence in the Churchill case, which had then been offered and was regarded as in evidence in this case. Plaintiffs' position before the court upon the question involved is fully disclosed as admitting that they could not recover for any timber included in their former recovery against Churchill. It was not objected that the question of estoppel by a former recovery could not properly be shown under the general issue raised by the pleadings. Court and counsel treated the subject as properly within the issues and tried the case upon that theory. Under these circumstances we deem it appropriate to regard the answer as amended to that effect. *Gill v. Rice,* 13 Wis. 549.

It remains to be determined whether the court erred in its ruling on this subject. An examination of the record and evidence in the Churchill case shows that the present plaintiffs prosecuted that suit and demanded damages for the removal of all the timber from the land in question. The evidence of both these plaintiffs in that action, as well as that of the other witnesses sworn by them, clearly claimed and tended to show that all the timber on the land had been removed by the present defendant under the claim of authority from Churchill, and that Churchill was liable for all the damages plaintiffs had suffered by and on account of such trespass. There appears to have been no dispute upon the trial of that action of the claim made by plaintiffs that the defendant had taken and removed all of the timber from this land, although Churchill and the present defendant claimed and insisted that it was removed by the latter under purchase of it from Churchill as owner of the premises. The jury found in that action that Churchill had no right to or interest in the land and that he was liable to the plaintiffs for the damages sus-

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tained by the removal of the timber by this defendant under the alleged sale. The court submitted the question to the jury as to what amount of damages plaintiffs had sustained upon the plaintiffs' claim in that regard in this prior case. From this it results that, since the jury found plaintiffs were entitled to a verdict in that action, they must be held to have assessed plaintiffs' total damages in the removal of all the timber from these premises. This amount has been paid and accepted by the plaintiffs. To permit a recovery in this action, under the circumstances, would of necessity result in allowing plaintiffs damages for the removal of timber which was included in the former judgment. Plaintiffs' counsel frankly conceded at the trial in the lower court and in argument on appeal in this court that the law would not permit them to recover damages which were included in the Churchill case, but it was contended that the facts showed that the present was not included in the former. This contention is not sustained by the facts. The record is clear and undisputed that the jury in the Churchill case must have included in their award of damages those now sought to be recovered. The court should have so ruled upon the trial.

By the Court.—Judgment reversed, and the cause remanded with directions to award judgment for the defendant.

CASSODAY, C. J., took no part.

PEAT, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 21—April 17, 1906.

New trial: Discretion: Review on appeal: Railroads: Injury to passenger: Evidence: Burden of proof.

1. Although the great weight of evidence is against the verdict, if there is any credible evidence to sustain it the refusal of the trial court to set it aside will not be disturbed.

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2. But if any fact essential to the verdict is supported only by testimony so in conflict with conceded and established physical facts as to be incredible for the reason that its truth is morally impossible or so improbable in the course of nature as to approximate impossibility, the setting aside such verdict is no longer discretionary with the trial court but a duty, failure of which is reviewable on appeal.
3. Plaintiff's uncorroborated testimony in this case that his injury (the cutting of his foot nearly off) was sustained when he was ejected from defendant's passenger train was rendered incredible by physical and established facts; and the verdict awarding him damages for that injury was so wholly unsupported that it was error not to set it aside. KERWIN and SIEBECKER, JJ., dissent.
4. Where there are two reasonably probable theories to account for an injury, the burden is upon the plaintiff to prove by some credible evidence that one which establishes defendant's liability.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Plaintiff was a passenger on defendant's train leaving Minocqua for the south between 4 and 4:15 p. m. January 13, 1902. At or near Hixon, a flag station with no buildings or platform, plaintiff was put off the train as result of a controversy as to nonpayment of fare, about three miles and a half from Minocqua. About 6:30 the same evening he was picked up by a north-bound train at a point 500 or 600 feet south of the south end of the passing switch at Hixon with his foot cut nearly off so that it was hanging by the tendon Achilles; was taken to Minocqua and treated, the foot being amputated. The testimony of the plaintiff and two other witnesses offered by him was that he was ejected at a point about three quarters of a mile north of Hixon. The testimony of the train hands and of one passenger was that his ejection took place at the station of Hixon and at a point varying from 200 to 500 feet north of the south switch of the passing track at that station. Plaintiff testified that in ejecting him he was pushed down the steps while the train was moving at the rate of five or six miles an hour, and that he

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swung off, let go his hold, and got his foot under the car. The testimony of his two witnesses is that at the time of his ejection from the car the train was moving at some such rate; neither of them saw the manner of his reaching the ground or the fact of his injury. All of the witnesses of the defendant testified to the effect that the train was stationary, having first stopped for the alighting of a passenger, then started again, and been at once stopped after moving from one to three car lengths; also that plaintiff reached the ground in safety, attempted to board the next car, but that the brakeman then alighted and held him away until the rear end of the last car had passed him, and that he was seen standing beside the track for some moments after the train passed on. Plaintiff's further narrative is that, having been ejected three quarters of a mile north of Hixon, and discovering that his foot had been cut off, he crawled a distance of some sixty or seventy rods along the track, when, at a curve about a half a mile north of Hixon, he saw the headlight of an approaching train from the south and crawled off the track to the side, and, as this train passed by him, shouted so as to attract the attention of the brakeman, who caused the train to stop, whereupon he was taken into the caboose and carried to Minocqua.

Another freight train, No. 94, reached Hixon about 6:20 p. m. and waited to pass a special log train from the south. As that log train appeared around the curve the engineer of No. 94 saw a man walking on the track 600 or 700 feet south of him, who, as the north-bound train approached, turned off the track and disappeared from his vision. After the log train had gone onto the switch at Hixon as No. 94 proceeded south, the engineer of that train saw something near this same point crawl across the track and the head brakeman saw a man lying on the west side of the track, who waved his hand and said something which he did not understand. That train passed on southward. Then the log train backed southward off the switch, and, as it did so, the brakeman on the caboose

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saw something crawl across the track, and, as they passed it, the plaintiff called to him that his foot was cut off. They accordingly brought the caboose beside the plaintiff and lifted him in and carried him to Minocqua. Next morning the section foreman, having learned of the accident and seen plaintiff, went to Hixon, and found at a point about 500 feet south of the south switch on the snow a considerable spot of blood on each side of the track and a trail of blood across the track from one to the other, but found no blood elsewhere.

A general verdict for the plaintiff was returned, a motion for a new trial for errors and because the verdict was contrary to the evidence was overruled, and judgment entered for plaintiff, from which the defendant appeals.

For the appellant there was a brief by *J. W. Cochran* and *H. H. Field,* attorneys, and *Chas. E. Vroman,* of counsel, and oral argument by *C. H. Van Alstine.*

W. E. Wheelan, for the respondent.

The following opinion was filed April 17, 1906:

Dodge, J. Appellant's principal contention is that the court erred in overruling the motion for new trial, which counsel primarily supports by assertion that the evidence so overwhelmingly preponderates against plaintiff that refusal to set aside the verdict on that ground was an abuse of discretion. This position is wholly untenable if there was any credible evidence to sustain plaintiff's contention as to the material facts. In such case, while the trial court has authority in its discretion to set aside the decision of the jury as likely in his judgment to work injustice, this court will not reverse a refusal so to do. *Flaherty v. Harrison,* 98 Wis. 559, 562, 74 N. W. 360; *Collins v. Janesville,* 117 Wis. 415, 424, 94 N. W. 309. None of the cases cited by appellant's counsel antagonize this rule, though he seems to think his attitude supported by a quotation from *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 387, 80 N. W. 467, to the effect that this

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court will reverse when it appears that the verdict is against the great weight of the evidence, and that supporting it is impeached or rendered improbable by conceded facts and all reasonable inferences. We pointed out in *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 256, 91 N. W. 666, that this rule requires not only that the great weight of evidence should be opposed to the verdict, but also that the so-called evidence seeming to support it should appear to be incredible as inconsistent with fully established facts or the known natural course of events. The meaning of the expression "against all reasonable probabilities," as rendering testimony incredible, was further explained in *Bourda v. Jones,* 110 Wis. 52, 60, 85 N. W. 671, 674, as follows: "A sworn statement which is obviously false in the light of reason and common sense and facts within common knowledge is not to be received in court as true because some witness wilfully or ignorantly or recklessly so testifies;" and again in *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57: "Testimony may be so in conflict with conceded and established physical facts as to be incredible for the reason that its truth is morally impossible or so improbable in the course of nature as to approximate impossibility."

When, however, any fact essential to a verdict is supported only by evidence thus rendered incredible, the setting aside such verdict is no longer discretionary with the trial court but a duty, failure of which is error reviewable on appeal. *Flaherty v. Harrison, supra; Cawley v. La Crosse C. R. Co.* 101 Wis. 145, 150, 77 N. W. 179; *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628, 78 N. W. 1084; *Musbach v. Wis. C. Co.* 108 Wis. 57, 68, 84 N. W. 36; *Bourda v. Jones, supra; Ellis v. C., M. & St. P. R. Co.* 120 Wis. 645, 98 N. W. 942. In the light of this rule and the authorities we proceed to examine the evidence.

The only elements of fact upon which the evidence can be considered at all in conflict, except by the testimony of plaint-

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iff himself, are as to whether he was ejected from the train three quarters of a mile north of Hixon or at the station, and whether, at the time of his ejection, the train was moving or stationary. Upon both these subjects the conflict is between witnesses, and while the testimony for the defendant is in a very high degree more certain and probable than that offered for the plaintiff, we shall not deem it necessary to declare the latter incredible. The crucial question is not just where plaintiff was ejected, nor whether he was ejected while the train was in motion, but whether his foot was severed at that time. Upon this question we are convinced that physical facts, and facts so impossible of mistake as to the operation of the railroad, and so undisputed by anything except plaintiff's own testimony that they must be taken as true, render incredible plaintiff's story as to that fact, either in connection with the details to which he testifies or with any other conceivable state of facts. It is established beyond controversy that he left the passenger train at a point, either 700 or 800 feet according to defendant's witnesses, or more than three quarters of a mile according to plaintiff, north of the place where, according to the testimony of the train hands who picked him up, he was found with his foot severed and bleeding. As to whether the place at which he was picked up is established, we can have no doubt. He locates it at a point considerably north of Hixon. In order that this should be true we must disbelieve that train No. 94 passed over the track southward, as testified by its various train hands and by the train hands of the north-bound logging train. A mistake in this regard by this crowd of witnesses with reference to such business is not credible. Secondly, we must ignore the physical fact that the only blood stains on the snow were south of Hixon and not north of it. And thirdly, we must disbelieve the testimony of all the train hands of the north-bound logging train as to the operation of that train and the place where they found this injured and bleeding man. A more

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cogent and complete case of physical and established facts inconsistent with the testimony of the plaintiff as to the place where he was picked up can hardly be conceived.

But almost equally conclusive are the facts against the theory that he could have received the injury which he suffered, at any other place than near where he was found. Even if we concede it possible that a man with a severed foot may, at the end of two hours, with no precautions against the hemorrhage, be conscious, even if alive, we still have the fact that all his movements which are disclosed by any evidence except his own are traced upon the snow by his blood, and that those movements are consistent with the fact that up to the time the north-bound logging train approached him and he was seen 500 or 600 feet south of the south switch at Hixon on the track he had not received this injury. Between that point and the place of ejection from the passenger train the snow was absolutely free from those marks which he must have left had he passed over it with the injured foot. Of course, as plaintiff contends, there is the other physical fact that his foot was in fact injured in some way and, doubtless, by a railroad train. The evidence shows a situation in which such an injury is entirely within reasonable probabilities, wholly consistent with the known facts, except perhaps plaintiff's own story. He was seen immediately in front of an approaching train. He had been ejected at a lonely and almost uninhabited spot, and was, of course, anxious to find transportation therefrom. It is entirely within the probabilities that, as this train slowly approached to enter the switch, he attempted to board one of the cars, and, under the conditions likely to exist in mid-January, was unsuccessful, and fell so that he received the injury without his attempt being observed by the train hands as they went by to the northward. This theory is consistent with the testimony of the engineer of train No. 94 that he was crouching by the side of the track making signals as that train went south a few

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minutes after. It is also consistent with the description of the blood spots, which are not of the dimensions likely to have been developed from hours of bleeding.

Of course it is not at all necessary for the defendant to prove how the injuries were received. It is only necessary that there should be some reasonable hypothesis to account for the fact of injury to deprive it of any strong probative force in favor of plaintiff's theory that it was received at the time he was ejected from the passenger train two hours before he was found. Where there are two reasonably probable theories to account for an injury the burden is upon the plaintiff to prove by some credible evidence that one which establishes defendant's liability. *Musbach v. Wis. C. Co.* 108 Wis. 68, 84 N. W. 36. In the situation thus disclosed, the plaintiff's uncorroborated testimony that he received his physical injuries when ejected from the passenger train and that he was picked up by the log train at a point north of Hixon was rendered incredible. The verdict awarding him damages for that injury was wholly unsupported, and error was committed in refusing to set it aside.

The only other error assigned relates to a detail of the instructions not likely of repetition upon retrial, which, therefore, we need not discuss.

By the Court.—Judgment reversed, and cause remanded for a new trial.

The following opinion was filed May 9, 1906:

KERWIN, J. (*dissenting*). I cannot concur in the opinion of the majority of the court. I believe there was sufficient evidence to carry the case to the jury. The plaintiff testified that he was ejected from the train at a point some three fourths of a mile north of Hixon, and was corroborated in his testimony on this point by two credible witnesses. True, these witnesses did not testify respecting the injury, since

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they were in the car and did not see plaintiff after he was taken by the conductor and brakeman out upon the steps and removed from the train. Plaintiff testified that as he was pushed off the steps he grabbed the iron rail with his right hand and hung on and swung in between the two coaches; that he thought he could push himself out to avoid being cut in two, and something from the outside struck him in the back and turned him over just as he let go, and he went down and was injured; that immediately thereafter he crawled some sixty or seventy rods to the point where he was found and picked up by a train going north. The defendant's witnesses testified that the train stopped at Hixon, and after starting and going but a car length or two it was again stopped and plaintiff put off. The evidence is not only in direct conflict with that of the plaintiff and two witnesses who testified that he was put off about three fourths of a mile north of Hixon while the train was in motion, but is also in conflict with the testimony of two credible witnesses who testified that the train did not stop at Hixon and did not stop until it reached Hazelhurst, a considerable distance south of Hixon. So, in my opinion there was ample credible evidence to warrant the jury in finding that plaintiff was put off the train at the point claimed by him, and that the train did not stop at Hixon nor until it reached Hazelhurst; hence plaintiff could not have been put off at Hixon as contended by defendant. There is no evidence whatever that the plaintiff was injured other than as he claims to have been. Therefore the jury were warranted in finding that the injury occurred in the manner testified to by plaintiff, unless this evidence is rendered so incredible by established facts and reasonable probabilities as to warrant the court in disregarding it. True, the testimony of the plaintiff as to how the injury occurred and that he was injured when put off the train is the only direct evidence on his part, but this evidence, if credible, is sufficient to warrant the jury in finding in his favor. *Harrigan v. Gilchrist,*

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121 Wis. 127, 99 N. W. 909; *Wis. F. L. Co. v. Bullard,* 119 Wis. 320, 325, 96 N. W. 833. The jury found in favor of the plaintiff and the trial judge refused to disturb the verdict.

The learned and experienced trial judge who tried this case was in a better position and better able to judge of the weight and credibility of the evidence than this court. *Harrigan v. Gilchrist, supra.* As said in *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 255, 91 N. W. 668:

"When a trial court has refused to set aside a verdict or special finding of a jury, this court will not reverse such order merely because, in its opinion, the verdict is against the preponderance or 'great weight' of the evidence; the deference which the court owes to the trial courts forbids such action. This court will reverse such a ruling only when there is no evidence to sustain the verdict or its finding, or where, though there be some evidence in its support, still the great weight of the evidence is against it, and that weight is so re-enforced by all the reasonable probabilities and inferences that it becomes overwhelming."

The rule is also laid down in *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 141, 88 N. W. 58, that

"If there is any credible evidence which to a reasonable mind can support an inference in favor of a party, the question is for the jury, and the court cannot assume to answer it, either upon motion for nonsuit or direction of verdict."

The majority opinion rests upon the hypothesis that the testimony of the plaintiff is so incredible as to render it insufficient to support a verdict. As said in the opinion of the court, the crucial question is not just where plaintiff was ejected, but whether his foot was severed at that place. In order to adopt the defendant's theory that plaintiff was ejected near Hixon we must not only disregard his evidence, but also the evidence of two other credible witnesses, who testified that he was ejected north of Hixon and that the train did not stop at Hixon. So, I think the jury would have been warranted in finding that the plaintiff was not put off at

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Hixon, but at some point north thereof at or near where he claims to have been.

The remaining question is whether such a case of physical and established facts inconsistent with the testimony of the plaintiff was made sufficient to render his testimony respecting the injuries unworthy of belief. I think the questions of where he was put off and whether he was injured at that place were for the jury. Whether he was picked up at a point 500 or 600 feet south of the south end of the passing switch at Hixon, or farther north, to my mind has but little bearing upon the credibility of the plaintiff's evidence. Assuming that he was picked up as claimed by defendant, that fact in connection with other evidence would still leave the credibility of his evidence for the jury. The plaintiff may honestly have been mistaken as to where he was put off and picked up. He was unfamiliar with the place, having been over the road but once before, and not having seen it after the injury until a few days before the trial and about three years after the injury. I think, also, the testimony of plaintiff may be reconciled with the evidence of the trainmen as to the movement of train No. 94, and that the testimony respecting a man on the track before the train passed and something that looked like a dog crawling off the track is not very significant. There is no proof that the man seen was plaintiff, or any positive testimony that the object crawling was a man. The proof is that, when the 6:20 p. m. south-bound train passed, some of the crew saw a man beside the track in the snow. This was consistent with the plaintiff's evidence, except as to the place where he was picked up. He testified that immediately after the injury he started to crawl south on the track and thinks he crawled sixty or seventy rods. Of course, the distance he crawled, as well as the distance from Hixon to the point where he was ejected from the train, was to some extent, at least, a matter of conjecture. It is not at all improbable that he may have been honestly mistaken as to the exact

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location of the place where ejected or the distance he dragged himself after the injury. There is nothing in the evidence to show that he bled much. The brakeman who helped pick him up testified that his foot bled "very little" then, and after he was put into the caboose, the evidence shows, it did not bleed much. "He had a high top rubber on his foot; blood had soaked through it into the stocking from lying; the rubber was not cut, or the top was not cut." The wheels had passed over his foot at the instep and ankle. The section foreman testified that he went over the road the morning after the injury, not for the purpose of locating any accident, but as he usually did to attend to his duties as section foreman; that he did not discover blood until he came to the place at or near where defendant claims plaintiff was picked up, and there he found some blood where plaintiff crossed the track at one point, and ten feet distant from there some more. It appears that he went over the track in the usual course of his business; he was watching the track and was not looking for blood spots. If attending to his regular business, as he said he was, he was looking for defects in the track, not for blood, and it is not improbable that there might have been blood on the track that he did not see. Moreover, it may be that if plaintiff continued to crawl as he says he did until he reached the point where he got off the track, sufficient blood did not escape through his footwear to be readily observable upon the track to one passing over it on a handcar. But, in any event, the testimony of the section foreman respecting the absence of blood was negative in its character and should not outweigh positive testimony. *Bohan v. Milwaukee, L. S. & W. R. Co.* 61 Wis. 391, 21 N. W. 241; *Hinton v. Cream City R. Co.* 65 Wis. 323, 27 N. W. 147; *Hutchinson v. Holmes Sanitarium,* 93 Wis. 23, 66 N. W. 700. The probative force of this negative evidence, given three years after the injury by a servant of defendant, was clearly for the jury. The same may be

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said of other evidence produced by defendant and claimed to be inconsistent with that of plaintiff.

I do not think there was evidence produced by defendant sufficient to render the plaintiff's positive testimony so incredible as to warrant this court in disturbing the judgment of the lower court in refusing to set aside the verdict.

SIEBECKER, J. I concur in the opinion of Mr. Justice KERWIN

CASSODAY, C. J., took no part.

IN RE CRANBERRY CREEK DRAINAGE DISTRICT.

March 22—April 17, 1906.

Drainage districts: Commissioners: "Competency:" Disqualification by interest.

1. The word "competent" in sec. 1379—13, Stats. 1898 (providing for the appointment of three competent persons as drainage commissioners), refers to skill, intelligence, and business ability, and does not mean disinterested, so as to disqualify for such appointment persons owning land in the proposed drainage district.
2. Where commissioners or boards act in a ministerial, administrative, or *quasi*-judicial capacity, pecuniary interest (such as, in this case, the ownership of land in a proposed drainage district) does not disqualify them unless expressly so provided by statute.

APPEAL from an order of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is a special proceeding under sections 1379—11 to 1379—39, Stats. 1898, and acts amendatory thereof. A petition for the organization and establishment of a drainage district was filed, and an order made by the court fixing the

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time of hearing. Thereafter and on August 8, 1904, three commissioners were appointed, two of whom, it is admitted, were owners of lands within the boundaries of the proposed district. After due notice given, the commissioners presented their report to the court for approval and confirmation. The appellant appeared and remonstrated against the confirmation of this report, and moved that the court order the proceedings for the confirmation of said report quashed and the report stricken from the files, for the reason that two of the commissioners were owners of land within the proposed district, and were, therefore, prejudiced. This motion was denied and an appeal taken from the order.

For the appellant there were briefs by *Ryan & Runke,* attorneys, and *Bauman & Davis,* of counsel, and oral argument by *Mr. R. B. Runke* and *Mr. L. A. Bauman.* To the point that the interested commissioners are disqualified under the common law, they cited *Gage v. Graffam,* 11 Mass. 181; *Edwards v. Estell,* 48 Cal. 194; *Stevenson v. Bay City,* 26 Mich. 44; *Clute v. Barron,* 2 Mich. 192; *Dwight v. Blackmar,* 2 Mich. 330, 57 Am. Dec. 130; *Wills v. Abbey,* 27 Tex. 202; *In re Southern Boulevard,* 3 Abb. Pr. N. S. 447; *Singletary v. Carter,* 1 Bailey, 467, 21 Am. Dec. 480; *Hunt v. Chicago,* 60 Ill. 183; Welty, Assessments, sec. 297; *Oconto Co. v. Hall,* 47 Wis. 208; 19 Am. & Eng. Ency. of Law (1st ed.) 470, 471; 25 Am. & Eng. Ency. of Law (1st ed.) 555.

For the respondents there was a brief by *B. M. Vaughan,* attorney, and *Goggins & Brazeau,* of counsel, and oral argument by *Mr. Vaughan* and *Mr. B. R. Goggins.*

KERWIN, J. The only question necessary to be considered upon this appeal is whether the two commissioners owning land within the proposed district were competent to act as commissioners.

1. It is contended on the part of the appellant that such commissioners were disqualified upon common-law principles

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and also by the express language of the statute. The statute provides (sec. 1379—13, Stats. 1898) that the court "shall appoint three competent persons as commissioners," and the question arises whether commissioners who own land within the drainage district are competent. Counsel for appellant contends that in order to be competent the commissioners must be disinterested, and that owners of land within the district are not disinterested. Much stress is placed on the word "competent," as used respecting witnesses, and it is urged that since a competent witness has been held to mean a disinterested witness, the word "competent" in the statute before us should be given such meaning. But at common law an interested witness was not competent to testify, and so it was held that a competent witness was a disinterested witness, and in order to be competent he must be disinterested. It will be seen, however, that the adjective "competent" has a variety of meanings depending upon the connection in which it is used, and that it does not mean disinterested in all cases. Crabb, English Synonyms; Standard Dict.; 2 Words & Phrases, COMPETENT; *Bowes v. Haywood,* 35 Mich. 241; *Pacheco's Estate,* 23 Cal. 476; *Ætna Ins. Co. v. Stevens,* 4 Ill. 33; *Att'y Gen. v. Hallett,* 2 H. & N. 368, 374; *Tenney v. State,* 27 Wis. 387. Competency may have reference to fitness, qualification, sufficient ability or authority, or having sufficient ability and training to successfully execute the work to be undertaken. A person competent to perform work requiring skill or business ability in the particular calling may be a competent person for such calling in the ordinary acceptation of the term; and so we think the intention of the legislature was to secure commissioners possessed of sufficient skill, intelligence, and business ability to successfully carry on the work in question, and that it was not the intention of the legislature to exclude persons who owned land in the district solely for that reason.

If the legislature had intended that persons owning land

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within the district should be incompetent to act as commissioners, it would have said so in unequivocal terms, as it has done in other statutes. The frequent use of the word "disinterested" in statutes providing for the appointment of commissioners seems clearly to indicate that it was used in cases where the legislature intended to exclude persons from serving on account of interest. Sec. 694*c*, Stats. 1898, provides for the appointment of disinterested residents to appraise land, and secs. 1379—34 and 1362, Stats. 1898, likewise provide for the appointment of disinterested persons. In condemnation proceedings our statutes usually provide that the commissioners shall be disinterested. Secs. 605 and 694*c*, Stats. 1898, provide that commissioners shall be disinterested, and sec. 1777*b* that they shall be disinterested and competent. Many other similar instances of the use of the word "disinterested" in the Wisconsin Statutes might be cited. The fact that the adjective "disinterested" is so used in the statutes seems to indicate that it is used and omitted advisedly, and that where the acts required to be done by the commissioners or board are largely ministerial or administrative interest is not regarded a disqualification. In view of these considerations it is reasonable to suppose that the legislature advisedly omitted from the statute in question the word "disinterested," thereby intending not to exclude persons owning land within the district from acting as commissioners. The inclusion of the word "disinterested" in some statutes and exclusion in others in cases providing for the appointment of commissioners seems to indicate legislative purpose, especially since the inclusion in our statutes is usually in cases where the duties of the commissioners are more *quasi*-judicial in their nature and less administrative than where the word is excluded.

In view of the scope of the act, the importance of the successful administration of the duties imposed upon the commissioners, the meager compensation provided, the duties

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largely ministerial or administrative, the provisions for oath of office and execution of bond for the faithful discharge of duties, and the fact that *quasi*-judicial duties are subject to the supervision and control of the court, it seems quite clear that the competency contemplated by the act was not calculated to exclude a commissioner because he owned land within the district. The legislature may well have had in mind that far more efficient service would probably be obtained from commissioners who were landowners in the district, and therefore interested in its success, than from persons who were not. Counsel rely upon *King's Lake D. & L. D. v. Jamison,* 176 Mo. 557, 75 S. W. 679. This case arose under a statute quite similar to our own, and the court construed the word "competent" to mean disinterested, on the theory that since "competent," as applied to witnesses, means disinterested, the word "competent," in the drainage law, should be given the same meaning. We cannot adopt this reasoning or agree with the conclusion reached.

2. We are unable to agree with counsel for appellant that, independent of the statute, ownership of land within the district disqualifies the commissioners. Several authorities are cited by counsel which they claim sustain their position. Some are under statutes which expressly provide that the parties shall be disinterested, and therefore are not in point, while others, we think, are clearly distinguishable from the case before us. It is true that there is some conflict of authority upon this question, but if the question were new in this state we would have no hesitation in holding that the ownership of land by the commissioners within the drainage district would not constitute such an interest as would disqualify them from acting as commissioners. *Scott v. People,* 120 Ill. 129, 11 N. E. 408; *People ex rel. Samuel v. Cooper,* 139 Ill. 461, 29 N. E. 872. We shall not, however, endeavor to review the authorities, because we regard the law settled in this state to the effect that in all cases similar to the one

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before us, where commissioners or boards act in a ministerial, administrative, or *quasi*-judicial capacity, pecuniary interest, such as appears in this case, does not disqualify them, unless expressly so provided by statute. The late cases of *State ex rel. Starkweather v. Superior,* 90 Wis. 612, 64 N. W. 304, and *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964, contain very elaborate discussions of the principles which govern the question under consideration here. We think the reasoning in these cases is decisive of the question before us, and deem further discussion unnecessary.

We have not referred to all the points made or authorities cited in the able argument of the attorneys for appellant, but may say in passing that all points raised and authorities cited by them have received careful consideration.

We hold that the commissioners were competent, and therefore the order appealed from must be affirmed.

By the Court.—It is so ordered.

CASSODAY, C. J., took no part.

PALMER, Respondent, vs. GOLDBERG, Appellant.

March 22—April 17, 1906.

Fraud inducing contract: Election of remedies: Pleading: Opinions as to value: Evidence: Knowledge of falsity of representations.

1. Where plaintiff was induced by fraud to accept a worthless note in payment for horses, his action upon such note, prosecuted to judgment and execution, was not the election of a remedy inconsistent with or barring a subsequent action against the wrongdoers for damages on account of the fraud.
2. A prayer for relief, in the later action, asking judgment for the value of the horses does not show an inconsistency with the former action, since, the note being worthless, the value of the horses is the measure of the loss caused by the fraud.

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3. Ordinarily a farmer is competent to give opinion evidence as to the value of such horses as he owns.
4. Findings by the jury, to the effect that defendants combined to defraud plaintiff and that representations by which he was induced to part with his property were made pursuant to such combination and were false, are *held* to be sustained by the evidence.
5. One who makes false representations of fact to induce another to enter into a contract whereby injury to the latter may result because of such falsity, is liable for the damages caused by his conduct, regardless of whether he knew, or in the exercise of ordinary care might have known, the truth of the matter.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action to recover damages for an alleged fraud.

These are the facts material to the cause of action, as claimed: Plaintiff, by false representations made to him by defendants, was induced to take the worthless note of defendant Bain as good for $500 in payment for three horses ostensibly purchased of him by said Bain, but really for or in the interest of defendant *Goldberg.* The latter two confederated together to induce plaintiff to part with his property for such note. Precedent to the transaction, *Goldberg* was employed by plaintiff to sell three horses, one being a stallion, on commission, with the understanding that if he sold the stallion for $500 he should have a commission of $150, otherwise no commission whatever. In furtherance of the wrongful agreement between defendants, *Goldberg,* ostensibly as plaintiff's agent, presented to him defendant Bain as an ostensibly prospective purchaser, while he was in fact a mere instrument of *Goldberg* to enable the latter to get possession of the horses without consideration. Upon presenting Bain, as aforesaid, *Goldberg* represented him to be an honest, responsible person, who always paid his obligations; that he was good financially, and that the plaintiff could safely sell the horses to him on credit. He induced plaintiff not to make inquiries independently, by saying that the bank and others

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where Bain resided would only make favorable reports respecting his financial standing, since they as well as himself (*Goldberg*) knew Bain to be a reliable man and one who always paid his notes. Confiding in such representations, and not otherwise, plaintiff delivered his horses to *Goldberg* for Bain, taking the latter's $500 promissory note, due in five months, indorsed by Otto Nelson, in payment therefor. Such indorser was wholly irresponsible. His participation in the matter was procured by defendants as a part of the means of carrying out their fraudulent scheme. At the due date of the note it was duly presented for payment, and payment refused, whereupon the same was duly protested for nonpayment. The representations made by *Goldberg* as to Bain's character and responsibility were affirmed by the latter. They were wholly false, and the note was entirely worthless. It was, in due time, put into judgment against maker and indorser, in a court of competent jurisdiction in Wood county, and all legal remedies exhausted to collect the same, without success. Bain's financial condition was the same when the note was given as when the efforts to collect the same were made. The plaintiff paid *Goldberg* $50 of the agreed commission, which he was not entitled to, because the one horse was not sold for $500.

Judgment was demanded: (1) That both defendants be held liable for the value of the horses; (2) that plaintiff have judgment for said value and interest, such value being $500; (3) that he have judgment against *Goldberg* for the money paid on account of commission but not earned; (4) that he have judgment against both defendants for costs; (5) and that he have such further or other judgment as might be deemed just and equitable.

Bain did not answer. *Goldberg* answered by general denial, and further, that plaintiff, with full knowledge or means of knowledge of all the matters complained of, prosecuted an action to judgment on the note, and thereby waived any right he would otherwise have to maintain this action.

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There was an objection to any evidence under the complaint, which was overruled, a proper exception being saved.

The evidence showed, or tended to show, that an agreement was made between plaintiff and *Goldberg* that if the latter sold one of his horses, a stallion, for $500 he should have $100 from plaintiff as a commission, and if he sold the stallion and other horses, obtaining less than $500 for the former, he should have no commission whatever. He presented Bain as a customer for the horses, by letter pretending to know him to be financially responsible, and representing that his note for $500 could be taken for or on account of the horses without hesitation. Relying thereon, plaintiff sold the stallion and one horse to Bain for $500, taking his note therefor, and sold one horse to *Goldberg* for $125, the arrangement being made with Bain, and later shipped the three horses, by direction, to the latter. Seventy-five dollars were subsequently paid on the one horse, *Goldberg* retaining the other $50 as due him for commission. The representations as to Bain's responsibility were untrue. He and *Goldberg* were both parties to the transaction of inducing plaintiff to take the note. The note was in fact uncollectible and worthless, as alleged.

The jury found specially, in effect, thus: Defendants conspired as alleged, to obtain possession of the horses. *Goldberg* represented by letter to plaintiff that Bain was a reliable man; that his note for $500 was good and could safely be taken for the horses. Such representations were reasonably calculated to induce a person of ordinary intelligence, in the exercise of ordinary care, to do as plaintiff did. He relied thereon in taking the note. Bain was not a man of reliability and responsibility for $500 when the note was taken. *Goldberg* knew that fact when he made the representations. The delivery of the horses to *Goldberg* was procured pursuant to a preconceived plan of himself and Bain, to defraud the plaintiff. The horses were of the value of $500.

After verdict several motions and rulings were made, and

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exceptions saved thereto, preserving for consideration on appeal the questions discussed in the opinion. Judgment was rendered in favor of the plaintiff on the verdict. Defendant *Goldberg* appealed.

For the appellant there was a brief by *Kreutzer, Bird & Rosenberry,* and oral argument by *M. B. Rosenberry.*

For the respondent the cause was submitted on the brief of *Andrew Gilbertson.*

MARSHALL, J. For a first reason why the judgment is erroneous, it is contended that the action on the note is inconsistent with this one, and, therefore, the election to prosecute the former created a bar to the latter. The first action was in affirmance of the contract; this action is, likewise. It is to recover damages caused by the execution of the alleged and found conspiracy to induce plaintiff to take a worthless $500 note in exchange for his horses. We are referred to the test of consistency between two actions given in *Barth v. Loeffelholtz,* 108 Wis. 562, 84 N. W. 846, namely: "Can the facts necessary to support one remedy coincide with the facts necessary to support the other?" That does not mean: Are all the facts necessary to support one remedy necessary to support the other? but it means this: Are the facts necessary to support one remedy consistent with those necessary to support the other? Frequently illustrations of the rule are given, as they are in the cited case, as for instance, one may sue for conversion where the facts warrant it, or waive the tort and sue on implied contract. The former suggests unlawful withholding of property; the latter, the contrary. A person may sue on a contract, voidable for fraud, or sue for a rescission on the ground of fraud and for an incidental recovery of the subject of the transaction, or merely sue for such recovery on the theory of a previous rescission. The former suggests continuation of the contract and acquiescence in the fraud; the latter remedies, repudiation thereof. One of the atti-

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tudes is obviously inconsistent with the other, therefore the assumption of either creates an estoppel or, rather, a waiver of the other.

In this case we are unable to see that the attitude of respondent in the action on the note is at all inconsistent with his attitude in claiming damages for the fraudulent conspiracy resulting in his taking the note in exchange for the horses. In the first the sale of the horses and the taking of the note were ratified. The same is true in the second action. No purpose was evidenced in the first action, nor is any in the second, to repudiate the contract of sale. The horses, from first to last, were treated as having passed irrecoverably from respondent's control, and the note as having become his property for what it was worth. The matter complained of in this action is that the note, when taken, was worthless, whereby, and on account of the fraud of the appellant and his associates, respondent lost his horses valued at $500.

Considerable significance is claimed for the circumstance that, by the prayer for relief, respondent indicated a purpose to recover the value of the horses instead of the difference between such value and that of the note. We see no serious inconsistency therein. The purpose of the pleader, plainly, was to claim the damages caused by the fraud. According to the facts stated, that is the value of the horses, since the note had no value whatever at the time it was taken.

It was suggested, there is no basis for the finding as to the value of the horses, as there is no evidence on that question. Counsel evidently overlooked the fact that it was stipulated in the case, as and for respondent's testimony, that he would testify that the horses were worth $500, and that he was as competent to give opinion evidence in respect to the matter as farmers generally are. Ordinarily a farmer is held to be competent to give opinion evidence as regards the value of such horses as he owns. The stipulation put some evidence in the record independently of the actual sale of the horses

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for $500, so it cannot be said that there is no evidence to support the jury's finding.

It is further contended that there is no evidence to support the finding that the appellant and his associates combined to defraud respondent, or that the representations made to him were pursuant to any such combination, or that such representations were false. There is no need, it seems, to discuss, in detail, the matters referred to in the argument of counsel on these points. They, it seems, failed to appreciate that the only false representations upon which the case stands are contained in the letters, which there is no dispute but what appellant wrote. They hardly bear any other reasonable interpretation than one calculated to create a conviction in the mind of respondent that Bain was a man of reputed integrity and responsibility, and that no one need hesitate to take his note for $500 in exchange for property of that value. There was undisputed reliable evidence that the very opposite was the truth; that at the time the note was given Bain was regarded unfavorably, rather than favorably, as to honesty and responsibility. The evidence in that regard was given, as it appears, by a man of considerable significance in the community where the respondent had a right to expect Bain was known. He testified to having had occasion to know whereof he spoke, and that he had knowledge in respect to the matter. It is suggested by counsel that the evidence was given as regards the reputation of Bain in Marshfield, whereas the case shows he lived in Unity. We are unable to find the evidence that he so resided. The case on the whole shows that he was quite likely to have been as well known in Marshfield as anywhere. Furthermore, the witness, as has been indicated, testified that he had occasion to know the character of Bain, indicating that he had either made investigations in respect to his character and responsibility for some particular purpose, or had transactions with him or with others where such character and responsibility were involved

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and thereby brought to his attention. The evidence of this witness was not met in any way. Appellant's counsel did not even cross-examine him. No evidence whatever was offered on behalf of appellant in regard to Bain's reputation or responsibility. Bain was sworn as a witness, yet he was not even asked as to his place of residence. No question was put to him, or to any witness in appellant's behalf, in regard to his standing as a business man at the time the note was given, nor did he defend against the claim made against him. So far as he was concerned the cause was permitted to go by default. It is difficult to see how the jury, under the circumstances, could have come to any other conclusion than they did. We will not take time to further discuss the evidence. In our judgment there was sufficient to support each of the findings.

Complaint is made that the court refused to submit a question covering the subject of whether the representations made were false. In our view there was no such refusal as to the false representations contained in the letters upon which the case rests. They were to the effect that Bain was a man of known honesty and responsibility. The jury were asked to find specially whether that was true or not, and did so find in favor of the respondent.

It does not seem that there is any suggestion in the brief of appellant's counsel, not heretofore referred to, which calls for special mention. There was no choice made between two inconsistent remedies. An action to recover on a contract, and one to recover damages for having been induced to enter into the contract, are not inconsistent with each other; both leave the contract undisturbable. The jury, on evidence proper for their consideration, found all the facts in respondent's favor essential to a cause of action for damages caused by an executed conspiracy to defraud: (1) The combination to injure; (2) representations in furtherance thereof to induce respondent to part with his horses in exchange for the

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promissory note of Bain; (3) the falsity of such representations; (4) the reasonable reliance thereon as true in parting with the horses in exchange for the note; (5) the injury. The jury went further and found that when the representations were made they were not only untrue, but that appellant knew that fact or ought to have known it, and did not believe them himself. The latter elements were not essential. *McNaughton v. Conklings,* 9 Wis. 316; *Tobey v. McAllister,* 9 Wis. 463; *Mann v. Stowell,* 3 Pin. 220; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605; *Matteson v. Rice,* 116 Wis. 328, 92 N. W. 1109; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923.

It is often said that it is sufficient as to the element of fraud in an action for damages on the ground of fraud, that the wrong-doer "knew or ought to have known" of the falsity of his representation. That is somewhat misleading. The element of "ought to have known" has reference merely to the idea that no one should make, in contractual negotiations, representations of fact to induce another to act so that injury might result to him in case of the representations being untrue, unless he knows whereof he speaks. So he is in law held as an indemnitor for the damages caused by his conduct, regardless of whether he knew, or in the exercise of ordinary care might have known, the truth of the matter. The duty to know in such a case is positive; nothing can excuse it.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

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WILL OF ARNESON: QUALE, Respondent, vs. WHITE, Guardian *ad litem*, Appellant.

March 22—April 17, 1906.

Wills: Language not understood by testator: Formal execution: Presumption from certificate: Presence of testator: Undue influence: Presumption: Findings: Review: Costs on appeal.

1. The fact that a will was written in a language which the testator did not understand does not render it invalid where, before executing it, he was accurately informed of its contents and meaning in a language which he did understand.
2. When it is established that testator affixed his signature to the instrument and that the persons whose names appear as subscribing witnesses signed a certificate which declares all the steps required for due execution, there arises a strong presumption that such steps were taken; and such presumption need not be supported by affirmative memory of witnesses, but, to defeat the will, must be overcome by evidence to the contrary.
3. Such presumption is not overcome by evidence that, after the testator had expressed his desire to execute the instrument and he and the first witness had signed, the latter, within hearing of the testator, directed the second witness to sign, which she did in the same room, although the testator's eyesight was so dim that he did not actually see the act of writing.
4. Where the trial court found as a fact that the evidence did not show such a situation as would give rise to a presumption of undue influence so as to throw the burden upon the proponent to show that none was exerted, and there is nothing to indicate that the rule of law in respect thereto was ignored or misapplied, such finding will not be disturbed unless contrary to the clear preponderance of the evidence.
5. Upon affirmance of a judgment of the circuit court which affirmed a decision of the county court admitting a will to probate, the respondent is awarded costs, it being held that the guardian *ad litem* of appellants should have been convinced by the concurring decisions of the lower courts that there was no such doubtful question or probability of a different result in this court as to make it his duty to appeal.

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APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

Ole Arneson, about eighty years old, and his wife two years younger, had emigrated to this country in 1869, and for about fourteen years before his death had lived in the village of Martell, Pierce county, Wisconsin, where they maintained ordinary neighborly acquaintance with the residuary legatee, *Quale.* Mrs. Arneson was taken seriously ill and the couple came to *Quale's* house at his request. Mrs. Arneson died at the end of about ten days after the removal. The testator remained there until his death in April following. He was feeble and mainly confined to his bed, although not wholly disabled from moving about. He had no relatives in this country, and, so far as appears, had no communications in late years with relatives left in Norway, who were nephews and nieces ranging in age from six years upward. Some time about November 27, 1903, Arneson had a visit from the pastor of his church and stated to him his wish to make a will and to leave his property to *Mr. Quale.* The pastor urged that, if he had no desire to remember his relatives, he ought to leave half of his estate either to the church or to some charity. To this suggestion he demurred strenuously, but, according to the evidence, after some urgency, said "I suppose I have to do it;" whereupon *Quale* interposed and said "No, you don't have to do it. A will isn't good for anything unless it is made by your own free will." The pastor left expecting to return in a few days and draw a will, he believing that it would be on the general lines already suggested. On the following day *Quale* attempted to procure the presence of a lawyer, Mr. Thompson, residing at Ellsworth, to draw a will; he being unable to attend asked *Mr. Quale* to give him the information necessary so that he could draw the will at his office. This was done and he wrote the will in question, which provided (1) for payment of debts and charge for tombstone; (2) gift of all residue and remainder to *Thomas N. Quale,*

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proponent, whom he appointed executor and required to furnish a proper and described funeral and to erect a suitable tombstone of the value of from $75 to $100 between the graves of testator and his wife. On the day after this paper was written, a neighboring merchant, Forseth, an old acquaintance of deceased, was called to the house. He found the testator in bed, and was handed the draft of the will by *Quale.* Forseth then asked the testator if he wished the will read, and, upon affirmative answer, read it to him, translating from the English in which it was written to Norwegian, which alone Mr. Arneson understood. Having done this, he asked testator if that was the way he wanted it and if he wanted to sign it, to which the latter replied "Yes," but he could not write, and wished Mr. Forseth to sign for him. That was done, the testator touching the pen to make the mark. Forseth then signed as a witness and said to Mrs. Hagestead, an inmate of *Quale's* home, that she should sign it as a witness, and indicated the place. She did so in the room near the foot of the bed. There was some evidence that testator's eyesight was very feeble so that it was doubtful whether he could see what was being done across the room. Testator at the time of executing the will declared in response to an inquiry from *Quale* that the latter had made no request of him to make this bequest. The estate was about $1,700, all personal. Forseth explained to testator that the will would have no effect until his death, and that at any time he could have it destroyed and make another. Thereupon the will, at the request of testator, was handed to proponent *Quale.*

The contest was made by one *F. M. White,* appointed guardian *ad litem* of minor heirs, four in number, nephews and nieces of testator, resident in Norway. The will was admitted to probate in county court, the guardian *ad litem* appealed, and upon a trial in circuit court with a jury the jury found Arneson not of sufficient mental capacity to make a will, but that the will was not made through undue influence

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exercised by or on behalf of *Quale*. The court made findings to the effect that Arneson was mentally competent, that there was no undue influence, and that the will was executed and witnessed in accordance with law, and entered judgment affirming the order of the county court, from which judgment the contestants by their guardian *ad litem* appeal.

F. M. White, as guardian *ad litem,* appellant, *in persona,* to the point that the burden was upon the proponent, under the circumstances shown, to prove that there was no undue influence, cited *Disch v. Timm,* 101 Wis. 179, 191; *Davis v. Dean,* 66 Wis. 100, 110, 111; *Will of Slinger,* 72 Wis. 22, 35; *Doyle v. Welch,* 100 Wis. 24; *In re Wheeler's Will,* 25 N. Y. Supp. 313; *Baker v. Baker,* 102 Wis. 226, 231; *In re Welsh,* 1 Redf. Sur. 238; *Weston v. Teufel,* 213 Ill. 294, 299, 72 N. E. 910, 911, and cases there cited; *Delafield v. Parish,* 25 N. Y. 9, 35–37; *In re Elster's Will,* 78 N. Y. Supp. 871, 874, 875; *In re Sickles' Will* (N. J.) 50 Atl. 577, 580.

John E. Foley, for the respondent.

Dodge, J. Upon the issues of fact we find no clear or overwhelming preponderance of evidence against the findings, which, therefore, conclude us unless it appear that error was committed by wrong application of rules of law.

It is urged that the will cannot be valid, couched as it was in the English language which the testator did not understand. Out of some contrariety of authority this court has decided that such fact is not an insuperable obstacle to the validity of a testament. *Will of Walter,* 64 Wis. 487, 25 N. W. 538. Of course in such a case it should appear clearly that the testator was otherwise accurately informed of the contents and meaning of the instrument in a language which he did understand, but that being established, as we consider to be the case here, there is no more doubt of his purpose and intention in executing it than if his knowledge of the contents

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were derived from reading or hearing read a document written in a language which he did understand. How, otherwise, could parties who understood no common language become mutually bound to any written contract?

Appellant invokes the rule that proponent must show affirmatively that all the conditions required by the statute in the execution of the will were complied with, and contends that the oral evidence of the subscribing witnesses fails to establish any declaration by the testator of his purpose to execute a will or any request that the witnesses attest it or knowledge that it was being attested by Mrs. Hagestead. While the rule of law is, undoubtedly, as appellant contends, the oral testimony of those present is not all the evidence. When it is established that testator affixed his signature to the instrument and that the persons whose names appear as subscribing witnesses signed a certificate which declares all the steps required by the statute for due execution, there arises a strong presumption that such steps were taken, and such presumption need not be supported by affirmative memory of witnesses, but, to defeat the will, must be overcome by evidence to the contrary. *Gillmor's Will,* 117 Wis. 302, 94 N. W. 32. In this case the oral testimony tends to establish that the will, which is in full testamentary form, was fully and correctly explained to testator, that he was asked if it was as he wished it and if he desired to execute it, and that he responded in the affirmative, with a request that Mr. Forseth write testator's name. Whereupon Forseth aided testator in making his mark, affixed his own name as a witness, and said to the other witness within hearing of testator, "Mrs. Hagestead, you sign this," which she did in the same room, first remarking that the seat on the lounge was too low to write conveniently. We agree with the trial court that there was nothing in this state of the testimony to overcome the presumption above mentioned in favor of the assertions in the attestation clause to the effect that Arneson signed, sealed, published, and de-

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clared the instrument as his will and that they subscribed as witnesses at his request and in his presence, although it might be believed that the testator's eyesight was so dim that he did not actually see the act of writing.

Appellant also invokes the rule that, under certain circumstances, although there is no direct proof of the exertion of undue influence, there will arise a presumption or inference to that effect so as to throw the burden upon the proponent to show that none was exerted. The more typical cases elucidating the application and limits of this doctrine are collected in *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939. It is, however, rendered plain by the findings that the trial court was guilty of no mistake or oversight in this respect, and he finds as fact that the situation to arouse such a presumption was not established by the evidence. There being nothing to indicate that this rule of law was ignored or misapplied, we must abide by this finding of fact in the absence of any clear preponderance of evidence against it, which we have already declared.

We are persuaded that the concurring decisions of the two lower courts should have convinced the guardian *ad litem* of appellants that there was no such doubtful question or probability of a different result in this court as to make it his duty to appeal, and that respondent should recover costs in this court.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

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BURD, Appellant, vs. WEBSTER, Respondent.

March 22—April 17, 1906.

Real-estate brokers: Commissions: Evidence: Revocation of agreement: Delay: Abandonment of contract: Identity of purchaser.

1. Evidence that, at the request of one who acted as agent between the seller and buyer of a farm, defendant had pointed out the place to the buyer and that he afterwards drew the deed for the transfer, is not sufficient to warrant recovery of a commission on such sale by plaintiff under an agreement by which he was to receive a commission on sales made through defendant's agency.
2. An agreement by plaintiff to pay defendant a certain sum for furnishing a buyer for a certain farm was not revoked, after plaintiff had furnished the name of a probable buyer, by defendant's informing plaintiff that he would pay no commission unless the farm should sell for a certain price,—plaintiff not having assented to such modification of the agreement.
3. The fact that, after plaintiff had furnished the name of a probable buyer, negotiations for the sale were protracted and delayed for some four months before it was consummated, did not show an abandonment of the agreement to pay a commission.
4. Although the formal conveyance was to a third person, yet the evidence is *held* to show that the sale of a farm, negotiated by defendant, was to the person whose name, as a probable buyer, was furnished by plaintiff.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

About the 1st day of February, 1903, the plaintiff, who had been engaged in the real-estate business at New Richmond, St. Croix county, Wisconsin, made arrangements with the defendant to come to Dane county to live and to engage in the real-estate business in Dane county as agent of defendant. By this arrangement plaintiff was to have the exclusive agency for defendant of certain portions of Dane county and was to have a commission of two per cent. on all sales made therein through defendant's agency.

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Plaintiff alleges that in the following January defendant made a sale of a certain farm belonging to one Humiston to a purchaser named Parman residing in that portion of Dane county of which he had the exclusive agency, and that defendant thereby became indebted to him in the sum of $170.40, the two per cent. commission previously agreed upon. The evidence showed that the farm upon which this commission was claimed was situated in St. Croix county and that it had been listed as for sale by defendant. The evidence also showed that this purchaser resided at Waunakee, Dane county, within plaintiff's territory, but it appears that this farm was sold through the agency of one Mr. Palmer of Madison, Wisconsin, and that defendant did not negotiate the sale and was not paid a commission on it. Upon this cause of action the court directed a verdict in favor of defendant.

For a second cause of action plaintiff alleges that on or about the 1st day of March, 1903, defendant had for sale a farm in St. Croix county known as the Burrows farm, and that defendant at or about that time made an oral agreement with him to pay him $500 if he would enable defendant to procure a purchaser for this farm. Plaintiff alleges that pursuant to such agreement he gave defendant the name of one Bondwell of St. Paul, Minnesota, as a prospective purchaser; that he wrote to Bondwell, and that defendant carried on negotiations with him which finally resulted in a sale of the farm to Bondwell; that the title, for the convenience of Bondwell, was conveyed to one Duffy, who had advanced the money to Bondwell, but that the sale was in fact made to Bondwell, and that plaintiff was the procuring cause of obtaining Bondwell as a purchaser.

The evidence of defendant was to the effect that the conversation with plaintiff in the spring of 1903 had reference to another farm, known as the Martin farm, and that plaintiff gave him the name of Bondwell as a probable purchaser of this farm; that he entered into negotiations with Mr. Bond-

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well for the transfer of the Martin farm, but that they were unable to make the sale. Defendant denied that the agreement had any reference to the sale of the Burrows farm to Bondwell, and he also claims that at the time of the negotiations in the spring he had no interest in the Burrows farm. He testified that in July of that year he offered plaintiff a commission of $500 for a sale of the Burrows farm, provided the place sold for $22,500; that the sale to Mr. Duffy was a *bona fide* sale; and that the negotiations with Mr. Bondwell for the sale of the Burrows farm took place after the negotiations with Bondwell for the sale of the Martin farm, pursuant to the arrangement made with plaintiff in March or April, had failed and proven fruitless. Plaintiff testified that the agreement made in the spring had reference to and included both the Martin and Burrows farms.

The following special verdict was returned by the jury:

"We, the jury impaneled to try the issues in the above entitled action, answer the special interrogatories submitted to us as follows: 1. Was a conversation had between plaintiff and defendant, at Madison, between February 1 and March 25, 1903, in which defendant offered to the plaintiff that he, the defendant, would give plaintiff a commission of $500 if plaintiff would furnish a buyer for the Burrows farm? *A.* Yes. 2. If you answer 'Yes' to question 1, then answer this: At the time of the conversation found by you in answer to question 1, was it understood by the plaintiff and defendant that the plaintiff must furnish a buyer for the Burrows farm at $22,500, in order to entitle plaintiff to a commission of $500? *A.* No. 3. If you answer question 1 'Yes,' then answer this: During the conversation mentioned in question 1, was the name of W. J. Bondwell mentioned as a probable purchaser of the Burrows farm? *A.* Yes."

The court refused to enter judgment for the plaintiff in accordance with the verdict, but held that under the undisputed evidence there had been a cancellation of the spring contract and that defendant was entitled to judgment and costs. This is an appeal from such judgment.

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For the appellant there were briefs by *Tenney, Hall & Tenney,* and oral argument by *F. W. Hall.*

For the respondent there was a brief by *Olin & Butler,* counsel, and oral argument by *H. L. Butler.*

SIEBECKER, J. Plaintiff contends, as to the first cause of action, that the testimony adduced warrants the inference that the sale of the Humiston farm to Parman was accomplished through defendant's agency. There seems to be no dispute as to the terms of the agreement under which plaintiff claims the right to a commission on the sale. Under its terms plaintiff was entitled to a commission if the sale was effected through defendant's agency. The trial court held that the evidence furnished no ground, in any reasonable view of it, for an inference that the sale of the farm to Parman was effected through defendant's agency. An examination of it confirms this conclusion. True, the defendant, at the request of one Palmer, who acted as agent between the seller and buyer in the transaction, pointed out the place to the buyer, and drew the deed for the transfer, yet there is nothing to show that defendant acted as the agent for either party to the transaction or that he received any commission or compensation for whatever he did in the matter. Under these circumstances the plaintiff failed to establish any ground for recovery under the contract upon which he relies.

For a second cause of action plaintiff alleges that the defendant agreed to pay him the sum of $500 for furnishing the name of a purchaser for a farm situated in St. Croix county, known as the Burrows farm and held by defendant as real-estate agent. Plaintiff alleges that this agreement was made in the city of Madison in the latter part of February or the first part of March, 1903, and that he, pursuant thereto, furnished to defendant the name of Mr. Bondwell of St. Paul, Minnesota, as a probable purchaser, and that as a result thereof the farm was thereafter sold to Mr. Bondwell by the

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defendant. Defendant denies that such an agreement was made, and alleges that the agreement did not pertain to this farm, but covered another known as the Martin farm. He also claims that whatever agreement was made had been canceled and revoked before any negotiations were had between him and Mr. Bondwell for the sale of the Burrows farm. The issues were submitted to the jury upon the evidence, who found that the agreement was made by the parties as plaintiff alleges, that under it defendant agreed to pay plaintiff a commission of $500 if he furnished a buyer for the Burrows farm, that there was no provision in the agreement providing that such commission was not to be paid unless the farm brought the sum of $22,500, and that plaintiff did furnish defendant the name of Mr. Bondwell as a probable purchaser.

It appears that plaintiff had discovered Mr. Bondwell to be a prospective customer and that he advised him by mail that he had furnished defendant with this information and had referred to him as a probable purchaser, to the defendant. It also appears that defendant soon thereafter communicated with Mr. Bondwell for the sale of the Martin farm and that Mr. Bondwell thereupon examined it but declined to purchase. At this time negotiations ceased between defendant and Mr. Bondwell until the following July, when the negotiations concerning the Burrows farm were taken up and finally resulted in a transfer of it to a Mr. Duffy under an arrangement between Mr. Duffy and Mr. Bondwell whereby the defendant and Mr. Duffy took a transfer of $13,000 of an electric light company's bonds from Mr. Bondwell and a mortgage of $12,000 on this farm as consideration of the farm and the payment of $3,000 in money. Defendant testified that he had informed plaintiff and other agents at some time in the summer prior to the sale that he would pay no commission to any agent on this sale unless the farm should sell for $22,500. The trial court held that this amounted to a revocation of the alleged agreement between plaintiff and

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defendant, and that it precluded recovery upon the alleged agreement.

There is nothing to show that plaintiff expressly assented to any modification of his agreement. If any modification or cancellation of the agreement took place it must have been inferential and on the ground, as held by the trial court, that such declaration by the defendant constituted a revocation of the contract found by the jury. To give proper significance and effect to this evidence of defendant the fact must be kept in view that he denied having made any such contract as the jury found was made in the preceding February or March. He could not have intended to revoke any contract, for he claims that none ever existed. Moreover, there is nothing showing that plaintiff understood it as a revocation of his contract. These circumstances fall short of constituting a revocation. They are entirely insufficient to cancel the obligation after plaintiff, by furnishing the name of a probable purchaser of this farm, had acted and performed his part of it. The fact that the negotiations were protracted and delayed until the month of July did not amount to an abandonment of the contract. There was no express limitation of time, and the lapse of time between the agreement and the sale was not so great as to warrant the conclusion that the contract had been abandoned by the parties.

It is further contended that plaintiff must fail in his recovery because the farm was sold to Mr. Duffy and not to Mr. Bondwell. While the details of the arrangement between Mr. Duffy and Mr. Bondwell are not fully disclosed, sufficient appears to show that the defendant sold Mr. Bondwell the farm, although the payments for it and the sale of Mr. Bondwell's bonds were arranged by defendant and Mr. Duffy, and that as part of the transaction a formal transfer of the title to the land was made to Mr. Duffy instead of to Mr. Bondwell directly. Defendant dealt exclusively with Mr. Bondwell as purchaser, and Mr. Bondwell went into immedi-

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ate possession. Mr. Bondwell still has possession under this transfer. Upon these considerations we must hold that the court properly awarded judgment of nonsuit on the first alleged cause of action, but erred in directing judgment in defendant's favor on the second cause of action. Upon this plaintiff was entitled to judgment in his favor.

By the Court.—The judgment is reversed, and the cause remanded with directions to award judgment as indicated in the opinion.

CASSODAY, C. J., took no part.

WHITMAN, Trustee in bankruptcy, Appellant, vs. MILWAUKEE FIRE INSURANCE COMPANY, Respondent.

March 23—April 17, 1906.

Insurance against fire: Oral contract: Evidence: Time for commencement of risk.

1. A written application to an insurance company for a policy of fire insurance, and a promise by the agent of the company to attend to the matter for the applicants, do not constitute a valid contract of insurance *in præsenti.*
2. It is essential to a valid contract of insurance that the time of the commencement of the risk be agreed upon.
3. A valid contract of insurance against fire may be made orally.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action on an alleged parol contract of insurance.

The statements in the complaint purport to show this state of things: August 8, 1904, Edward J. Laufenberg and Godfrey Laufenberg, owners of a cheese factory and its belongings, located on certain described land, agreeable to solicitation by defendant's agent, consented to have such property

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insured for one year against loss by fire in defendant company, to the extent of $1,200, at the rate of two and one-half per centum. The agent took an application in writing accordingly, it being then agreed between the Laufenbergs and him as such agent that the property should be insured, to take effect at 12 o'clock noon of the day aforesaid, the amount payable therefor being then paid. October 3d thereafter the property was destroyed by fire. There were other allegations satisfying all conditions precedent to the right to recover, if there were in fact a binding contract of insurance made, and showing that the right in that regard was in the plaintiff, as trustee in bankruptcy of the assured.

Defendant answered, denying that the agent had authority to make such a contract as the one alleged to have been made, or that he assumed to have such, or that he in form made any such contract.

Further answering, the defendant alleged:

(1) The Laufenbergs applied to the agent for insurance on their property at the time stated in the complaint, claiming to own the same, and the agent received their application in writing accordingly, agreeing to transmit the same to the defendant, which was done, but they did not pay any money on account of the insurance, nor was the application accepted by the agent, nor was any agreement made by him for the defendant company, or otherwise, to insure the property. The application was rejected by the company a few days after it was taken, and notice thereof was given to the applicants.

(2) The so-called contract of insurance was based on a written application providing that the answers and representations therein, as to all matters inquired about, were just and true, and should form the basis for the policy-contract in case of one being consummated, all answers to be deemed incorporated therein, and to constitute continuing warranties.

(3) The premises were then incumbered by mortgages, whereas the answers in the application were to the contrary.

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(4) It was represented in the application that the property cost $1,000, which was known by the applicants to be false.

(5) It was represented in the application that the property was owned by the applicants in fee simple, and that the real estate on which the factory was located was under a perpetual lease to the applicants. In truth, the factory was not owned in fee simple by them. They had no perpetual lease thereof. The factory stood on a piece of ground leased to Godfrey Laufenberg for cheese factory purposes only; the Laufenbergs had no title to the land, and no title to any lease thereof.

The evidence was to the effect that the property was considered extra-hazardous, so that it was very difficult to obtain insurance thereon. Three policies were issued in respect thereto within a short period before the time of the alleged contract, each being canceled or ordered canceled immediately upon or very soon after the company interested being notified of its agent's action in the matter. The agent who represented the insurance companies, including the defendant, was engaged in the banking business. The transactions occurred at the banking house, and the policies were kept there. On the occasion in question the agent informed Godfrey Laufenberg that he could obtain insurance on the property or had found a company that would take the risk. The defendant was mentioned in that connection. Upon being so notified, Laufenberg entered the banking house with the agent, and they proceeded to make the necessary application in writing, the agent acting as scrivener and Laufenberg answering such questions as were propounded to him. The application was made out for a policy carrying $1,200 insurance on the property. When the form was filled out ready for signature, Laufenberg signed it on behalf of himself and his brother, and it was then left with the agent, who promised to look after the matter. No money was paid on account thereof. The agent was told to take pay out of the account of the Laufenbergs at the bank, to which reply was made by the agent

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that he would see to it. The Laufenbergs, in fact, at that time had no credit at the bank out of which the insurance could have been paid. There was nothing said as to when the insurance should commence. The entire transaction consisted of making the customary application, in writing, for a policy of insurance and a promise by the agent to attend to the matter for the applicants. He had no authority to accept the application, or to make a contract of insurance. His authority was limited to taking the application, and transmitting the same to the company for its approval or disapproval. Laufenberg did not read the application. There was nothing said or done to prevent him from doing so, or to put him off his guard in respect to the matter. It contains several false representations. It was stated therein that the factory was located on land held by the applicants under a perpetual lease, whereas the lease ran to the Laufenbergs and their father, and it was contingent upon the factory being maintained. It was stated in the application that the property was not incumbered, whereas there was a chattel mortgage on the building for $500 and one on the machinery therein for $325. The latter was known to the agent, but not the former. The Laufenbergs had been accustomed to allow the agent to look after the insurance matter for them. The evidence further tended to show that when the application was made out, no inquiry was made as to the value of the building, the ownership of the lease, or incumbrances on the property, and that the contents of the application were not known to Godfrey Laufenberg when he signed the same. On the other hand, there was evidence to the effect that every question answered was read to Laufenberg, and the answers thereto written down as given.

The application was rejected by the defendant promptly after its receiving notice thereof, and prior to the fire. There was a conflict as to whether the assured were notified thereof or not, prior to the fire.

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The jury found specially these facts: The Laufenbergs made an oral contract of insurance October 8, 1904, as stated in the complaint. They were not thereafter notified, prior to the fire, that the application was rejected or the contract canceled.

The court held that the first finding was wholly unsupported by evidence as to the element of time when the contract of insurance should commence, and therefore there was no such meeting of minds in respect to the matter as is essential to a binding agreement. The finding was thereupon, on motion, changed to a negative, and judgment was then rendered in defendant's favor.

For the appellant there were briefs by *Morris, Riley & Dudgeon,* and oral argument by *M. S. Dudgeon.* They contended, *inter alia,* that in the absence of any mention of the time at which the insurance was to take effect, the circumstances and the previous dealings between these parties demonstrate that it must have been understood to be in effect immediately. Kerr, Ins. § 40; 1 Wood, Fire Ins. (2d ed.) sec. 26; 1 May, Ins. (4th ed.) §§ 23, 43B; *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216; *Winne v. Niagara F. Ins. Co.* 91 N. Y. 185; *Scott v. Home Ins. Co.* 53 Wis. 238, 240. Irrespective of previous transactions, and although in the transaction of August 8th no time was mentioned at which the insurance was to go into effect, nevertheless the insurance became operative immediately. 7 Am. & Eng. Ency. of Law (2d ed.) 134; *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216, 223; *Ellis v. Albany City Ins. Co.* 50 N. Y. 402; *Mathers v. Union Mut. Acc. Asso.* 78 Wis. 588, 593; 2 Joyce, Ins. § 1441; 1 Wood, Fire Ins. (2d ed.) sec. 20; *Union Ins. Co. v. American F. Ins. Co.* 107 Cal. 327. See, also, *Potter v. Phenix Ins. Co.* 63 Fed. 382; *Winne v. Niagara F. Ins. Co.* 91 N. Y. 185, 190.

For the respondent there were briefs by *Olin & Butler,* and oral argument by *H. L. Butler.*

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MARSHALL, J. It is considered the determination of the court below, as to there being an entire absence of evidence warranting the jury in reasonably coming to the conclusion that a contract of insurance was made between respondent and the Laufenbergs, cannot be disturbed. It is absolutely essential to any contract that the minds of the persons representing the two sides of the matter shall consentiently meet upon the major proposition constituting the same; upon a particular result to be accomplished, involving mutual obligations for future performance, or a consideration moving *in præsenti* from one to the other as an equivalent for something later to be rendered by such other or some person to the former or some one. Contracts of insurance form no exception to this. One of the prime essentials of such a contract is the time of the commencement of the risk. We fail to find any proof that such element was agreed upon in the instance under consideration. It was not even mentioned. One of the Laufenbergs testified at one time during the trial that the agent promised that the insurance should take effect at noon on the day the application was made, but he later admitted that such was not the fact; that a remark of that kind was made to him by the agent on a former occasion of insuring the property, but that on the one in question nothing whatever on the subject was said. So the want of evidence on that point in appellant's favor, with the evidence against him, shows most conclusively that no contract *in præsenti* was thought of at the time the application was made. The real transaction, according to the testimony of Laufenberg, was an agreement that the agent would attend, in due time, to the matter of taking such further steps as were necessary to effect the insurance, subject to the action of the respondent. No money was paid. The only assurance given by the agent, as said by Laufenberg, was that the former "would see to it, take care of it so it would be all right," would "get a policy." That is consistent only with the idea that the only contract of

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insurance in contemplation was one to be evidenced by a policy issued in the usual way.

As indicated in *Taylor v. Phœnix Ins. Co.* 47 Wis. 365, 2 N. W. 559, 3 N. W. 584, the presumption arising from the ordinary transaction of making a written application for insurance is that the actors in the transaction had in mind a contract to be closed at some subsequent time. The first step is not supposed to involve binding contractual relations; it suggests only future probabilities in that regard. To displace that, by establishing, as a fact, that something out of the ordinary was contemplated: the actual closing of a contract, precedent to the issuance of a policy in the ordinary way such contracts are made, pretty clear evidence is required showing that the minds of the parties met on that precise proposition. Evidence that the circumstances characterizing an application were closed by a mere promise on the part of the agent to attend to the matter of obtaining a policy of insurance, is, as suggested in the case cited, proof that no contract of insurance was supposed to be closed *in præsenti.*

We need not continue the discussion. The principle involved is pretty fully illustrated in *Wood v. Prussian Nat. Ins. Co.* 99 Wis. 497, 75 N. W. 173, and the early case of *Strohn v. Hartford F. Ins. Co.* 37 Wis. 625. In the first case cited it was said that an oral contract of insurance, like any other, requires a meeting of minds as to all of the essential provisions, leaving nothing to be done but to execute it. The evidence required to show such meeting of minds, when the nature of the contract is of such an extraordinary character as that of an oral one of insurance, must necessarily be pretty definite. It takes evidence sufficient to satisfy the mind to a reasonable certainty to establish in a court of justice the affirmative as to any matter in dispute. When such affirmative is to the effect that an occurrence of an extraordinary character has taken place, circumstances which ordinarily characterize a common transaction of a particular sort

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must necessarily be supplemented by other circumstances of considerable weight, to show that a radically different transaction was in the minds of both parties in the particular instance. There are no such circumstances here. Rather, there is positive evidence, and circumstances as well, confirmatory of the idea that the Laufenbergs simply made an application for a policy of insurance.

It has been doubted by some writers as to whether an action can be legitimately maintained on an oral contract of insurance, in view of the state of the law at present. Duer, Ins. 60; 1 May, Ins. § 14. Most courts, however, in harmony with our own, hold that parties may properly make such contracts under the elementary principle that there is no limitation upon the right of private contract outside of the written law. Some courts have specialized, without any good reason, as to insurance contracts, holding that one may be complete without the element of time for the commencement of the risk being settled. *Potter v. Phenix Ins. Co.* 63 Fed. 382. Such authorities, however, are highly exceptional and are not to be followed. This court holds to the idea that insurance contracts are to be treated as regards elementary principles the same as others. There are many authorities elsewhere to the same effect as to the precise question under consideration. The following are a few of the illustrations at hand: *Comm. Mut. M. Ins. Co. v. Union Mut. Ins. Co.* 19 How. 320; *Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153; *Tyler v. New Amsterdam F. Ins. Co.* 4 Rob. 151; *Hartshorn v. Shoe & L. D. Ins. Co.* 15 Gray, 240, 244, 247, 249; *Orient Mut. Ins. Co. v. Wright,* 23 How. 401, 409; *Piedmont & A. L. Ins. Co. v. Ewing,* 92 U. S. 377, 381; *Kimball v. Lion Ins. Co.* 17 Fed. 625; *Hamilton v. Lycoming Ins. Co.* 5 Pa. St. 339; *Scammell v. China Mut. Ins. Co.* 164 Mass. 341, 41 N. E. 649.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

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HALL, Appellant, vs. CITY OF MADISON and others, Respondents.

March 26—April 17, 1906.

(1) Stare decisis. (2–8) *Elections: "School matters:" Right of women to vote: Who are "electors:" Bonding city for school house: Territory attached to city for school purposes: Right of its electors to vote: Limitation of amount to be borrowed: Repeal of statute.*

1. To overcome the rule of *stare decisis* and justify the overturning of a carefully considered decision of this court because of the discovery of a new argument not suggested when the decision was made, that argument should be of such convincing cogency as to compel belief not only that the decision was legally indefensible but that it would be palpably wrong to permit it to stand.
2. The question whether women might (under ch. 211, Laws of 1885) vote at an election not involving the selection of officers but involving merely the decision of a question pertaining to school matters, was not decided in *Brown v. Phillips*, 71 Wis. 239, or *Gilkey v. McKinley*, 75 Wis. 543.
3. An "election," within the meaning of the statutes of this state, includes a referendum vote to decide a question of policy, as well as an ordinary election to choose between candidates for public office.
4. An election to determine whether a city shall issue bonds for the purpose of building a school house is an "election pertaining to school matters" within the meaning of ch. 211, Laws of 1885.
5. The word "electors" in sec. 943 (providing for submission to the electors of the question of issuing bonds) means the electors qualified by law to vote on any given proposition and therefore, in respect to an election pertaining to school matters, includes women, they being fully qualified constitutional electors at such an election.
6. Ch. 288, Laws of 1893 (subd. 6, sec. 12, Stats. 1898), not having been submitted to the people, could not add to or subtract from the right of suffrage upon school matters given to women by ch. 211, Laws of 1885. All that the legislature could do, without such submission, was to provide the machinery for executing the law of 1885, as was done by ch. 285, Laws of 1901.

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7. Contiguous portions of a town having by statutes been attached to a city for school purposes in order, merely, that the inhabitants of such territory might send their children to the city schools upon payment of their share of the expense of operating such schools, such inhabitants have no right to vote upon the question of bonding the city to build a school house.
8. Sec. 926—11, Stats. 1898, giving to all cities operating under special charters the power to issue bonds for the erection of school buildings, operated to repeal ch. 295, P. & L. Laws of 1861, so far as that act limited the power of the city of Madison to borrow money and issue bonds for a high school.

MARSHALL and KERWIN, JJ., dissent.

APPEAL from an order of the circuit court for Dane county: CHESTER A. FOWLER, Judge. *Affirmed.*

For the appellant there were briefs by *Bird, Gilman & Hobbins* and *Charles F. Lamb,* counsel, and oral argument by *Mr. G. W. Bird* and *Mr. Lamb.*

For the respondents there was a brief by *A. C. Hoppmann,* attorney, and *Jones & Schubring,* of counsel, and oral argument by *Mr. B. W. Jones* and *Mr. Hoppmann.*

WINSLOW, J. This is a taxpayer's action in equity to restrain the city of *Madison* and its officers from issuing corporate bonds for the construction of a high school building. A general demurrer to the complaint was sustained, and the plaintiff appeals. It will only be necessary to state very briefly the substance of the complaint. It alleges that the common council of the city passed an ordinance authorizing the issuance of corporate bonds in the sum of $250,000 for the erection of a high school building in the city; that, pursuant to petition of more than one tenth of the voters, a special election was called and held at which 1,380 male voters voted for and 1,518 against the issuance of bonds, and 1,098 female voters voted for and 673 against the issue. The complaint also alleges that a part of the town of Blooming Grove is attached to the city of *Madison* for school purposes, and is a part of the school district, and that the voters of said at-

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tached territory were not allowed to vote at such election. Certain alleged legal limitations on the power of the city to issue bonds are also pleaded, which will be more fully stated later in this opinion.

From the foregoing statement it appears that, according to the allegations of the complaint, the proposition to issue bonds was defeated if the votes of males only should have been counted, but was carried if the votes of females should also be counted; so the question at once arises whether women are entitled to vote at such an election. The election in question was called and held pursuant to the provisions of sec. 943, Stats. 1898, as amended by ch. 312, Laws of 1903, which provides that no bonds shall be issued by any town, village, or city until the proposition shall have been submitted to the *people* of the municipality and adopted by a majority voting thereon, and further provides that when any such bond issue is contemplated a special election for the purpose of submitting the question of such bonding to the *electors* shall be called and held. The law contains full provisions as to the manner of conducting such an election, and also provides that it shall not apply to the issuance of bonds for school purposes, and certain other named objects, by a city, unless demanded by a petition signed by not less than ten per cent. in number of the voters who voted in said city at the last general state election. Adult women were allowed the right to vote at the election in question in this case, on the ground that such right had been conferred upon them by virtue of the provisions of sec. 1, ch. 211, Laws of 1885, now sec. 428*a*, Stats. 1898, which provides that every woman who is a citizen of this state of the age of twenty-one years or upwards (with certain exceptions unnecessary to state), "who has resided within the state one year, and in the election district where she offers to vote ten days next preceding any election pertaining to school matters, shall have a right to vote at such election." This act was submitted to tl people at the general election

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in 1886, and approved by a majority of the votes cast. The reason of this submission was that the constitution of the state, by sec. 1 of art. III, in specifying who shall be electors, limits the electorate to four classes of males, but provides that the legislature may "at any time extend by law the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election." By ch. 285, Laws of 1901, a sentence was added to sec. 428*a* aforesaid, as follows:

"Separate ballot boxes shall be furnished at every election precinct in this state at every primary, general, municipal or special election, for the use of women desiring to vote on said school matters, and separate ballots shall also be provided at said elections for the use of said women."

It should also be noted that by ch. 288, Laws of 1893, the legislature codified the laws of the state relating to electors and elections, and by sec. 1 of that act, now sec. 12, Stats. 1898, classified electors into six classes; the sixth class being defined in subd. 6 as follows:

"Every woman who is a citizen of this state, of the age of twenty-one years or upwards, who has resided within the state one year and in the election district where she offers to vote ten days preceding any election pertaining to school district matters and the election of school district officers, and who is not a pauper or excluded by sec. 2 of art. III of the constitution, may vote at any election pertaining to such matters and the election of such officers in any town, city or village in which she has so resided."

Such being the constitutional and statutory provisions bearing on the subject, the appellant claims, in substance, (1) that the constitution does not authorize the giving to any class of a right to vote at a special class of elections, but only to extend the right to vote at all elections, and hence that ch. 211, Laws of 1885, is unconstitutional; (2) that in any event the act, as construed by this court in *Brown v. Phillips,* 71 Wis.

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239, 36 N. W. 242, only gives women the right to vote for school officers or employees; (3) that even if the act be held valid, and extends beyond elections for school officers, the election in question was not an election pertaining to school matters; (4) that the term "electors," as used in sec. 943, Stats. 1898, does not include women, who at best are only qualified electors.

Proceeding to the consideration of these objections, it must be said that the validity of sec. 1, ch. 211, Laws of 1885, now sec. 428*a*, Stats. 1898, can hardly be considered as fairly open to discussion. It was directly attacked in *Brown v. Phillips, supra,* and it was distinctly said in the opinion by the present chief justice: "We must hold the act in question to be a valid law." In the following case of *Gilkey v. McKinley,* 75 Wis. 543, 44 N. W. 762, it was said concerning it:

"That section owes its vitality to a direct vote of the electors of the state, and a like vote would doubtless be required to repeal it. Although, under the special provisions of subd. 4, sec. 1, art. III, of the constitution, sec. 1, ch. 211, Laws of 1885, is in the form of a statute, yet it is essentially *a part of the constitution.*"

It is true that in both of these cases the right of women to vote at certain elections was denied because the law was not deemed self-executing, and no machinery had been provided by law for the proper exercise of the right; it is true, also, that the precise ground of invalidity now suggested was not suggested in either of them, but in each case the law was definitely declared valid by this court. The discovery of a new argument will hardly justify the overturning of a carefully considered decision, unless, indeed, the argument be of such convincing cogency as to compel the mind to believe not only that the former decision was legally indefensible, but that it would be palpably wrong to permit it to stand. No such situation is here presented. The present argument is

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ingenious, but not necessarily mind-compelling. It certainly does not possess the strength required to overcome the rule of *stare decisis.*

But it is said that this court decided, in *Brown v. Phillips, supra,* that the only right given to women by the statute is the right to vote in the choice of school officers and employees. It seems to us that a very brief consideration of that case demonstrates the fallacy of the argument. A decision is always to be construed bearing in mind the question presented. The exact question in that case is well stated in the opinion, upon page 248 (36 N. W. 245), as follows:

"On the part of the defendants it is claimed that such right only extends to the voting directly for school officers. Upon the part of the plaintiff it is contended that such right extends to the voting for any officer having any duties pertaining to school matters, however remotely."

Upon this question, thus sharply presented, the decision was as expressed upon page 253 (36 N. W. 247):

"An election for the choosing of any school officers or school employees would be an 'election pertaining to school matters' . . . the choosing or selecting of any other officers is not an 'election pertaining to school matters' within the meaning of the act."

It is therefore clear that no question was considered or discussed save the question as to what officers women might vote for. The question whether women might vote at an election not involving the selection of officers, but involving merely the decision of a question pertaining to school matters, was neither considered nor decided, nor was it decided in the case of *Gilkey v. McKinley, supra.*

So we approach the question whether the election in question was an "election pertaining to school matters" within the meaning of the act, unembarrassed by any contrary intimation in the previous cases. In the first place it should be said that an "election," within the meaning of the statutes

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of this state, includes a referendum vote to decide a question of policy such as the issuance of bonds, the issuance of saloon licenses or the amount thereof, just as well as it includes an ordinary election to choose between candidates for public office. The very first definition given of the word in *Brown v. Phillips, supra,* is "the act of choosing; choice." Whether it is a choice between alternative policies or a choice between persons, it is equally an election. If further argument were needed on this proposition it would be readily found in the fact that such referendum votes are always termed "elections" by our statutes, as, for instance, a local option election (sec. 1565*a,* Stats. 1898), and an election to fix the saloon license fee (sec. 1548), and, to come nearer home, the very referendum in question is called an "election" by the section which requires it (sec. 943).

Being, therefore, an election, the question is: Can it be properly said to pertain to school matters? Upon this subject it is argued that the paramount question submitted is the question of the incurring a municipal debt, and that the purpose for which the debt is to be incurred is but an incident, and does not make the election one which pertains to school matters. This argument is not without force, but we cannot deem it sound. The money, if borrowed, was to be borrowed solely to build a school building; it could be used for no other purpose. Stripped to its essence, the question to be decided was: "Shall the city borrow $250,000 and build a high school therewith?" Is not the borrowing of money to build a school house an act pertaining to school matters as much as the expenditure of moneys in hand for that purpose? Suppose there were a law providing that, whenever a city proposed to build a school house or purchase a new school site costing more than a given sum, the question whether such a sum should be spent for that purpose should be submitted to vote; would not the election held under such a law be strictly an election pertaining to school matters? Would the fact

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that the expenditure of municipal funds was involved take from the proposition its character as an election pertaining to school matters? In fact, does not any proposition relating to the better management of the schools necessarily involve the question of the expenditure of corporate funds? And if women are to be denied the right to vote because the expenditure or the borrowing of money is involved, does not the law become a mere husk without the kernel?

These questions bring us to the broader question of the general purpose of the law. It must, of course, be assumed that it was passed to give some substantial right to women which they did not before possess. To suppose that the legislature or the people intended by the use of vague language or glittering generalities to "make a promise to the ear and break it to the hope," or to seem to give a right which was, in fact, substantially withheld, cannot be entertained without an imputation of bad faith to both legislature and people. If the purpose had been to limit the right to school district meetings, or to voting for school officers or employees, it would have been easy to do so by simple and appropriate language. No such purpose can, in our judgment, be spelled out either from the language of the act or its title. On the other hand, the very broad and general nature of the language used indicates clearly the intent to cover a broad field rather than a narrow one. The title of the act (ch. 211, Laws of 1885) exhibits this intent most persuasively. It is: "An act relating to the exercise of the right of suffrage by women upon school matters." It is not the right to vote at school district meetings (which can only be called the right of suffrage in a limited sense), or the right to vote for school officers, but the *right of suffrage upon school matters,* to which, the legislature declares by the title, the act refers. Nor is this declaration of intent narrowed or limited by the wording of the act itself. The act, in terms, gives women the right to vote at any *election* (not at any district school meeting) "pertaining to school

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matters," and further, it provides that the form of the ballots to be used by the people in voting upon the law should be: "For woman suffrage in school matters," and "Against woman suffrage in school matters." These broad general words indicate the intent to give the full right of suffrage in school matters, or else they indicate an intent to deceive by apparently giving much while in fact giving little or nothing. The latter intent cannot be entertained for a moment.

The intent being, therefore, to give broad powers, powers substantially equal to those possessed by male voters, so far as such elections are concerned, the act should be construed to effect that intent so far as possible. *Ut res magis valeat quam pereat.* There should be no narrow construction given, no paring down of the rights attempted to be given by the people's mandate. Indeed, it is difficult to see upon what ground any attempt in that direction can be justified. Theoretically, women have fully as much interest in the conduct of the common schools as men; it is common knowledge that they display more interest in them practically. The nursery is the first schoolroom of the race; the mother is the first teacher, and from her lips come the earliest and perhaps the most important lessons. When the child goes to school the great majority of its teachers, from the kindergarten to the high school, will be women, and if either parent takes any interest in its progress by visiting the school, in nine cases out of ten it will be the mother. When the legislature and the people, therefore, attempted to give to women the right to participate with men in the management of the schools, they acted upon practical, not fanciful, reasons; they did an act of tardy justice rather than an act of bounty or grace. There was no reason why they should not so participate; there was every reason why they should. Giving the law, therefore, that reasonable breadth of construction which is necessary in order to make it fulfil its evident purpose, we have no difficulty in reaching the conclusion that an election to deter-

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mine whether bonds shall be issued to build a school house is strictly and truly an "election pertaining to school matters." The difficulty found in the *Brown* and *Gilkey Cases,* namely, that further legislation was needed in order to render the law capable of execution, has now been removed by the provision of the necessary machinery for receiving and counting the votes of women (ch. 285, Laws of 1901), so that no obstacle remains in the way of giving full effect to the law.

But it is urged that when the legislature provided, by sec. 943, Stats. 1898, that bonds should not be issued by a municipality until their issue had been approved by a majority of the electors of the municipality, the word "electors" meant the same body of electors in all cases; *i. e.* that it did not mean one class of electors when the question is as to the issuance of bonds to improve streets or build sewers, and a larger class when the question is as to the issuance of bonds to build school houses. It was directly held in the *Gilkey Case* that ch. 211, Laws of 1885, became, after it was adopted by the people, "essentially a part of the constitution." The class of voters thus added to the electorate in elections pertaining to school matters became substantially constitutional electors. It would seem to be a very serious question whether the legislature has any power to provide for an election at which only a certain part of the electors recognized by the constitution should be allowed to vote. For instance, could the legislature provide for an election to determine whether bonds should be issued, and limit the right of voting at such election to property owners, or to voters between certain ages? We suggest the question, but do not find it necessary to decide it. If, as we now hold, this election was in fact an election pertaining to school matters, and if, as we also hold, women are fully qualified constitutional electors at such elections, it must be presumed that when the legislature used the word "electors" without qualification they used it advisedly, and meant the electors qualified by law to vote on any given prop-

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osition. The fact that the legislature provided that no referendum should be necessary in case of the proposed issuance of bonds for street improvements, school purposes, and certain other public improvements except when petitioned for by ten per cent. of the voters who voted at the last general election, seems to us as having no material or persuasive bearing. It certainly does not indicate an intention by the legislature to deny to any constitutional elector his right to vote at the election which might be rendered necessary by the filing of the petition. Such an intention, even if it could be effectual, should be clearly expressed. We have not found it necessary to consider or discuss the effect of ch. 288, Laws of 1893, now subd. 6, sec. 12, Stats. 1898, upon the question. It is plain that it did not and could not add to or subtract from the act of 1885, because it was never submitted to a vote of the people. The only thing that could be done by the legislature alone after the passage of ch. 211, Laws of 1885, was to provide the machinery for its execution, and this has been done by ch. 285, Laws of 1901.

Certain other objections are made by the appellant to the legality of the proposed bond issue, which will be briefly considered. It appears by the complaint that the common schools of the city of *Madison* are operated under the provisions of ch. 295, P. & L. Laws of 1861, and certain subsequent amendments thereto. The act named provides that the territory which is or may hereafter be included in the city of *Madison* shall constitute a separate school district; it also provides for the government of the district by a board of education of six members, to be chosen by the common council of the city, two members being chosen annually; that this board shall be a body corporate by the name of "the board of education of the city of *Madison;*" shall elect a treasurer, president, and clerk; shall have power to establish schools, and manage them, purchase sites, build school buildings, employ teachers, and generally manage the schools of the city, and to expend the

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school funds therefor which are to levied by the common council and paid over to the treasurer of the board. The act also authorizes the school board to buy a site and erect a union or high school, for which the common council was authorized to levy a tax or borrow a sum not exceeding $10,000, and issue city bonds therefor. It further appears that various contiguous portions of the town of Blooming Grove have been attached to the city of *Madison* for school purposes, and have been required to pay taxes for the support and maintenance of the schools of the city at the same rate as the city, which taxes are paid over to the treasurer of the board of education of the city. Ch. 159, Laws of 1861; ch. 203, P. & L. Laws of 1867; ch. 127, Laws of 1877.

It is argued that the referendum vote is void because the voters in the attached territory were not allowed to vote, also because the power to borrow money to build a high school is limited to the sum of $10,000. Neither contention can be sustained. The situation of the inhabitants of the so-called attached territory seems simply to be that they have the privilege, on payment of their share of the expenses of operation of the *Madison* schools, to send their children to those schools. In this sense this territory and its inhabitants are part of the school district, but apparently in no other. The school district, so far as government is concerned, is still the territory included within the city limits of *Madison;* that city, through its board of education, purchases and sells school sites, and builds, operates, and owns its school buildings without let, hindrance, or aid from the attached territory. If new school houses must be built, the city of *Madison* builds them. The attached territory and its inhabitants receive school privileges, but do not participate in the ownership, control, or management of the schools. In this view it is clear that such inhabitants have no right to vote on the question of bonding the city of *Madison* to build a school house.

As to the $10,000 limitation contained in the act of 1861,

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the objection is answered by reference to the provisions of sec. 926—11, Stats. 1898. This is a general act passed expressly for the purpose, as its terms clearly express, of giving to all cities operating under special charters the power to issue bonds for certain purposes, among which is "the erection, construction, and completion of school buildings, and the purchase of school sites."

There are no other points made which require treatment.

By the Court.—Order affirmed.

MARSHALL, J. (*dissenting*). The question involved here is not one to be viewed very much by the light of sentimental considerations, nor that of public policy. The former may embellish truth, but does not point the way to it. The latter may, in a proper case, make language, otherwise plain, appear to be ambiguous, and justify judicial construction, and aid in that regard, but otherwise it is a matter solely for legislative consideration. Where words are plain and, taken as they read, lead to no absurd consequences, no consideration of public policy, in the judicial view, can legitimately create ambiguity, giving rise to opportunity and justification for varying the literal sense. Applying the rule to a statute, "there can be no reason for refusing to admit the meaning which the words naturally present; to go elsewhere in search of conjecture in order to restrict or extend the act, would be but an attempt to elude it. . . . However luminous each clause might be, however clear and precise the terms of it, all this would be of no avail, if it be allowed to go in quest of extraneous arguments, to prove that it is not to be understood in the sense which it naturally presents." Smith, Stat. & Const. Law, § 478. So much as a preface to what I may say regarding the meaning of the statutes here involved and suggestion of why, from my standpoint, I cannot agree with the reasoning of my brethren as to how such statute should be understood.

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Some additional prefatory remarks respecting the subject of how a judicial decision of one minor proposition among others, the solution of which by a logical process leads to the major conclusion embodied in the judgment, should be regarded upon such minor proposition becoming subsequently a major inquiry between parties not bound by the doctrine of *res adjudicata,* are appropriate at this point. That subject, in fact, is one of the most important features of this case, and we may well discuss it at considerable length.

This court and other courts have said over and over again that all propositions assumed by the court to be within the issues and all questions presented, considered, and deliberately decided by the court, leading up to the final conclusion reached, and upon which it is based, are as effectively passed upon as the ultimate question solved. There is well-nigh no end of support for that doctrine. We will content ourselves with referring to a small part thereof. *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56; *State v. Nat. Acc. Soc.* 103 Wis. 208, 217, 79 N. W. 220; *South Bend C. P. Co. v. Geo. C. Cribb Co.* 105 Wis. 443, 445, 81 N. W. 675; *Becker v. Chester,* 115 Wis. 90, 128, 91 N. W. 87, 650; *Carstairs v. Cochran,* 95 Md. 488, 52 Atl. 601; *Michael v. Morey,* 26 Md. 239, 261; *Allen v. Flood* (1898) A. C. 1; *Kirby v. Boyette,* 118 N. C. 244, 24 S. E. 18; *School Trustees v. Stocker,* 42 N. J. Law, 115; *Hawes v. Contra Costa W. Co.* 5 Sawy. 287, Fed. Cas. No. 6,235; *Porter v. Lee,* 88 Tenn. 782, 14 S. W. 218; *State ex rel. Bailey v. Brookhart,* 113 Iowa, 250, 84 N. W. 1064; *Railroad Cos. v. Schutte,* 103 U. S. 118, 143; Wells, Res Adjudicata, § 217. The citations are to this effect:

"Where several points are decided any of which would determine the case, the conclusion upon none can be rejected as *obiter* because it was not necessary to the result."

"Where several points are presented and decided, the conclusions as to none can be said to be *obiter* because another

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point was found which really dominated the whole situation and disposed of the case."

"Though a question was not fully argued, the decision thereof is not *obiter,* if it was fairly involved in the case, and the judicial mind was fairly drawn thereto and expressed upon the subject."

"When a principle is declared in answer to a contention in the case and as a step in reaching the final result, not by way of mere argument or illustration, it is not to be regarded as *obiter dictum.* The manner in which it is applied to the case does not destroy its weight as an authoritative exposition of the law upon which the adjudication rests."

The idea that a decision on a point not necessary to the final result is to be regarded as *obiter* was thus characterized in *Kirby v. Boyette, supra:*

"The proposition upon which the contention . . . is based is unsound in law. . . . The theory is that if a court in the elucidation of the questions involved in any given controversy finds it necessary to crystallize the law upon the subject into a clean-cut rule, which will prove a guide to the profession," such rule is without force, "because the case in hand might have been decided by stating the principle governing the particular case instead of the broader one founded upon the reason of the thing but decisive also of other cases as well as that at bar. To lend our sanction to such a view of the law would be to imperil the security of many principles upon which titles have been acquired under the advice of the most competent counsel. A due regard for vested rights necessarily constrains a court to reject such a theory as little short of revolutionary."

Quite as emphatic as that is the language of WAITE, C. J., in *Railroad Cos. v. Schutte, supra,* part of which is quoted above, followed by this:

"Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

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The application of these citations to *Brown v. Phillips,* 71 Wis. 239, 36 N. W. 242, will later become clear.

The cited authorities cover the subject of *res adjudicata,* the force of the rule of *stare decisis* as a law of property, and such rule in its broader sense as well, all applying to the question in hand. A matter of law so judicially declared as to be binding upon parties to the action in which the declaration is made and their privies, under the doctrine of *res adjudicata,* if it pertains to property and is sanctioned, so to speak, by lapse of time, is binding upon all under the doctrine of *stare decisis,* as a rule of property, and if it does not fall within such rule it is to be regarded nevertheless as having such stability as not to give way to judicial action except upon some seemingly overpowering necessity. The doctrine is voiced by text-writers thus:

"The certainty of a rule is often more important than the reason of it; the maxim *Stare decisis, et non quieta movere* is a safe judicial policy and should be adhered to. If the law as heretofore pronounced by the court in giving construction to the statute ought not to stand, it is in the power of the legislature to amend it without impairing rights under it."

The importance of the doctrine thus declared cannot be overestimated. To depart from it by regarding the conclusions reached, as to all questions of law in every case that might have been passed without affecting the final result, as mere *obiter dicta,* "loose sayings; words spoken by the bye, or on the spur of the occasion," as the writers define the term, or, in other words, without force as to future litigation, would result in the most unfortunate confusion in the administration of justice.

The view of courts generally on this subject is not better expressed anywhere than in *Palmer's Adm'rs v. Mead,* 7 Conn. 149, in these words:

"There is not in the common law a maxim more eminently just, and promotive of the public convenience, than that of

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stare decisis. . . . If law well established may be annulled, by an opinion, a foundation is laid for the most restless instability. . . . No system of inflexible adherence to established law can be as pernicious as . . . ceaseless and interminable fluctuations."

A pretty full discussion of the subject of what respect should be paid to decisions of the character above indicated, is found in *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56. There the rigorous rule as to what constitutes *obiter,* seemingly applied here to the decision in *Brown v. Phillips,* 71 Wis. 239, 36 N. W. 242, and which seems to be necessary from the standpoint of the court to avoid the effect of it, in an opinion by the present chief justice, was most emphatically repudiated, and the view there expressed has since been repeatedly indorsed here and elsewhere. The case will be found frequently cited in the text-books and the decisions of other states as an authority to be followed.

The application of the doctrine so declared and indorsed is not more strikingly illustrated than by the history of *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. There four points were decided, any one of which was a legitimate basis for the final result. One of them was not argued at length by counsel, nor treated extensively in the opinion of the court. In a brief paragraph it was referred to by the learned chief justice who wrote the opinion, and pointedly decided. Thereafter, from time to time, what was said in respect to the matter was argumentatively mentioned by individual judges as *obiter,* but the court did not venture to overrule it. Some eighteen years after the date of the decision, it was, by a divided court, recognized as authority. *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345. Somewhat later, upon a cause being presented where the point involved was vital to the result, such decision was held to be a judicial rule and so firmly established in our judicial system, being a rule of property, that only the legislature could properly change it.

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Becker v. Chester, 115 Wis. 90, 91 N. W. 87, 650. Still later that same point so referred to for over eighteen years as *obiter,* was given the dignity of having been the one of primary importance when it was first passed upon. *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258.

In view of the foregoing and many other illustrations of a similar character that might be given, it seems a mistake for the court to say, in effect, that a decision, as a judicial rule, goes really no further than the mandate: the decision of the ultimate question in the case, or questions essential to the final result. If that were correct, the major part of every legal opinion would be *obiter.* There would be very little use for writing legal opinions and preserving them as precedents. All that would be useful would be a statement of the facts and the decision. That is the view expressed by the present chief justice in *Buchner v. C., M. & N. W. R. Co., supra.* In treating one of the underlying questions in the case, he said that if the extreme rule as to what constitutes *obiter* were to prevail, what he was then saying should be so characterized whenever subsequently referred to for authority in the decision of a case.

From the foregoing it would seem—when the court in deciding a case meets one of its recorded conclusions in some prior litigation, which was reached as one among other steps in approaching the final result that might, however, have been attained without taking that particular step, but which if to be followed is presently controlling, though in the light of the particular investigation produced by the new situation it appears to be wrong and not so firmly intrenched but what it may properly yield—that the more orderly way to solve the difficulty is to face the matter squarely, confess the error, and rectify it, rather than avoid it by the easy method of saying that it was not necessary to the former decision and hence is to be disregarded. This court has, it is believed, made few departures from such better way. To those few, I venture to

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say, it has added one in the decision from which I now dissent.

So we have now here for consideration only a cold question of law. Warm it all we may with beautiful expressions as to the broad field of woman's influence, and her disposition to fully occupy it; illuminate it all we can by the light of right public policy, it remains a question of law still, not one as to what the law ought to be, or what we would have it to be, but of what it in fact is, as voiced by the lawmaking power and declared by this court. I would not willingly yield to any one in thought or expression or deed in paying tribute to the capacity and disposition and accomplishments of woman in moulding the destinies of children. I could sit, as it were, at the feet of motherhood in supreme satisfaction and veneration, singing praises before the mind's personification of its beauty and grandeur and usefulness, towering above all other things in preparing the young to cope successfully in the activities of life. But however much I may think womankind should be allowed and in fact should participate in governmental affairs "pertaining to school matters," I must face the stern fact that courts do not make the law; they only declare it as they find it. In that I do not intend to suggest want of appreciation of that situation by others: to claim the slightest superiority in that regard for myself. It is only to emphasize the point of view from which I take my observation of the written and the unwritten law on the subject in hand.

The written law is as follows:

"Every woman who is a citizen of this state, of the age of twenty-one years or upwards, . . . who has resided within the state one year and in the election district where she offers to vote ten days next preceding any *election pertaining to school matters* shall have a right to vote at *such election.*"

The difficulty now is in respect to the meaning of the term "election pertaining to school matters." We shall not take

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time to carefully analyze it. It goes without saying, it seems, that generally speaking the word "election" applies to the choice of officers, not the mere expression of approval or disapproval in respect to a referendum proposition. True, in its broad general sense it includes all acts of choosing between individuals or alternatives; but what does it mean in the act in question? The literal sense of the word, ordinarily, in legal enactments relates to choice of persons for public office by voting; the exercise of the right of suffrage. In the constitution it is used over and over again and not in one instance, so far as we can discover, in any other sense than the one indicated. When a referendum is provided for and the time for submission is not confined to that of a choice of officers, the term "election" is not used. When it is so confined, the idea of submitting the matter to a vote is spoken of as something distinct from the election itself; it is provided that it shall or may occur at the election. In sec. 5, art. XI, of the constitution, provision is made for submitting questions relating to banks at any general election, the result to be declared, not solely with reference to the vote cast in favor of the proposition, but to that and the vote cast at such election, referring to the election of officers. In sec. 1, art. XII, of the constitution, providing for submitting to a vote of the electors a proposed amendment to the constitution, the term "election" is not used, as the legislature is left free to submit such matter at an election or not in its discretion. The term is used in the same way in statutes, though with here and there an exception. That would lead, it would seem, very naturally to the belief that the legislature did not depart from that idea in the instance in question; that in using the term "election pertaining to school matters" they had in mind only election of officers, not an occurrence of voting on every subject pertaining directly or indirectly to the management or maintenance of schools that might be passed upon at the polls.

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The most that is claimed for the word "election" by those uniting in the decision from which I dissent is that the term as used is open to construction, and that its real meaning is as held. I do not think it is so very clear that it is so open. If we grant that it is, however, then we have in favor of the literal sense the particular construction that has been given thereto for some twenty years. The law was passed in 1885. From that time to the instance in question no one seems to have supposed that it related to anything other than choice of officers. Is it not strange, if the legislature in submitting the matter to a vote of the people, and the latter in favoring it, supposed it related to voting upon every question that might be submitted to the electors, that the right was never exercised as now claimed until the exigency therefor arrived as to the particular matter in question in the city of *Madison?*

As proof further that no such broad meaning was intended for the term by the legislature, there is the fact that in the revision of the Statutes by Sanborn & Berryman in 1889, the law of 1885 was incorporated as we now find it, in connection with an explanatory note to the effect that it was not intended to afford women the unlimited right of voting at elections pertaining to school matters, and that "election," therein, refers to choice of school officers, citing the decision of this court in *Brown v. Phillips,* 71 Wis. 239, 36 N. W. 242, made shortly after the law was enacted, and then fresh in the minds of the revisers, the decision having been made during the process of their work. Manifestly they framed the explanatory note in accordance with their and the common understanding of the law as then declared. They used substantially the language of this court, doubtless observing the headnote to the case prepared by the official reporter containing these words: "An election pertaining to school matters . . . is an election for the choosing of school officers or school employees."

We further point to the well-nigh, if not quite, conclusive

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indication of a legislative construction in the fact that the law with the explanation of its meaning aforesaid and the decision of this court with the official reporter's characterization of the point decided therein, were brought sharply to the attention of the legislature in 1898, at the time of the last revision, without any attempt being made to change it, or to modify the annotation. True, the adoption of the revision did not adopt such annotation; yet such adoption, under the circumstances, without the revisers' attention being called to any error in the latter so as to lead to a change thereof, if one were necessary, affords strong proof of legislative recognition of the law as meaning what the annotation indicates. That condition remained undisturbed down to the occasion in question, rendering the decision of *Brown v. Phillips, supra,* which we will now speak of more particularly, about as forcible under the rule of *stare decisis* as one could well be.

In the case referred to, this court was brought face to face with the subject of determining the meaning of the term under discussion. True, the particular question involved was whether an election "pertaining to school matters" included the election of city officers generally having to do with such matters in the remote sense of choosing members of the school board and approving of contracts relating to schools, but it was assumed, as the history of the case bears unmistakable indications, that the point presented called for a construction of the term under consideration, not in part, but in the whole. An examination of the briefs of counsel, preserved in the state library, discloses that the case was presented at the bar in the broad aspect suggested. Counsel for the respondent contended for the correctness of the broadest meaning that could be taken of the law. They insisted that the legislature intended to extend to women the privilege of participating in all that concerns the interest and welfare of the schools. Counsel for the appellant contended that the intent, at the most, went no further than to give to women the right to vote

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at the election of officers having to do with the immediate management of the schools. In dealing with the subject the court demonstrated, historically, that from first to last the thought in the legislative mind, in formulating the enactment, was participation of women in the election of school officers. In closing the subject in the opinion, this plain language was used:

"Such right to vote is only given at an 'election pertaining' or relating 'to school matters.' . . . What are we to understand by the word 'election' as thus qualified? When standing alone it is defined as 'the act of choosing; choice; the act of selecting one or more from others.' . . . *Such qualified 'election,' therefore, must mean 'the act of choosing a person to fill an office or employment' in 'school matters.'* . . . An election for the choosing of any school officers or school employees would be an 'election pertaining to school matters.'"

The whole trend of the opinion seems to indicate that the idea of the term "election" having been used in any other sense than that of choosing officers or employees was not entertained by the court for an instant. Such being the case, it is not to be wondered at that the revisers, while the decision was fresh in mind, formulated the explanatory note heretofore referred to, in harmony therewith.

What has been said sufficiently shows from my standpoint that the conclusion reached by the court is wrong. We might rest the matter without going further. Turning however to sec. 943, Stats. 1898, as amended by ch. 312, Laws of 1903, under which the proceeding giving rise to this litigation was had, we are unable to find any warrant therein for participation by women in deciding the bond proposition at the polls. The law referred to, so far as necessary to have it in view in this discussion, is as follows:

"Unless it is otherwise provided by law, no . . . city . . . shall issue any bonds . . . unless upon compliance with the following conditions: Whenever a . . . common council shall declare its purpose to raise money by issuing bonds, it shall

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direct, by resolution, which shall be recorded at length in the record of its proceedings, the . . . city . . . clerk to call a special election for the purpose of submitting the question of bonding the . . . city . . . to the electors thereof. . . . Such election shall be held at the usual place or places of holding elections, unless the . . . common council shall in the resolution . . . designate some other place or places. . . . Provided . . . that when any such special election is held at the same time as a regular . . . city . . . election, then such form of ballot . . . may be printed upon the official ballot to be voted at such election. . . . Provided, however, that the provisions of this section shall not apply to the issuing of bonds by any city of this state for . . . school purposes . . . unless within thirty days after the passage by the common council of the city of a resolution or ordinance authorizing the issuing of bonds for such purposes there shall be filed in the office of the city clerk a petition in writing *signed by not less than ten per cent. in number of the voters who voted in said city at the last general state election,* asking for a submission of the question of issuing such bonds to a vote of the people."

By my brethren, subject to a query to which some attention will be given later, it is conceded that unless the term "electors thereof" in the enactment includes women they improperly voted on the occasion in question, even if the limited right of suffrage granted to women is as broad as respondents' counsel contends and the court holds. In determining the meaning of such term we make but little progress by considering its general scope. That its ordinary signification is, a person having a constitutional right to vote at elections, generally, of public officers, needs no discussion. True, in its broad sense it includes all persons who have a constitutional right to vote on any proposition submitted to the public for an expression of their choice. The question for us to solve, however, is what is its meaning in the law under consideration. The first rule of construction to be applied, as before indicated, if the law is open to construction at all, is that it must be presumed that the legislature used the term according to

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the meaning generally ascribed to it. That would not include those having a mere limited right of suffrage, one not extending to elections generally. Is there anything in the law indicating that the legislature used the term in a different sense? They could not have used it at the outset with reference to the limited right of suffrage conferred upon women, because whereas such right originated in the law of 1885, the law in question originated in 1872. That is proof conclusive, it would seem, that none but persons having the full right of suffrage were thought of by the original framers. That is strikingly significant of the legislative purpose. It is provided that in case the bonding proposition is voted on at a regular city election, the ballot may be part of the general official form. That feature was added to the law of 1903 two years after the enactment of ch. 285, Laws of 1901, providing separate ballot boxes for women. Comparing those two laws, it is seen that the later expression of the legislature does not include the thought that women are to vote on a bonding proposition. Under the law of 1901 they are not to use the ballot boxes or ballots provided for general elections. Under the act of 1903 no ballot is contemplated except those proper for the use of persons having the full right of suffrage.

The most convincing feature of the act of 1903 in support of our contention is the proviso that the bonding proposition is to be submitted to a vote of the electors, only upon condition of a petition therefor in writing being filed with the city clerk signed by not less than ten per cent. in number of the voters who voted in the municipality in the last general state election. Can there be any doubt but what the *persons* competent to petition are the *persons* to whom the proposition is required to be submitted? No one can belong to the former who did not vote in the municipality at the previous general state election; no one could have done so without possessing the full right of suffrage. Women do not possess such right;

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therefore they cannot be counted as petitioners under the act. We see no way of escaping that logic. I understand counsel for respondent to have conceded *that* on the oral argument, and to have failed to respond readily, if at all, to a request for some logical reason for saying a person not competent to petition for submission of the bonding matter to vote of the electors may yet be regarded as an elector for the purpose of voting thereon. We hoped the court would treat what counsel seem so significantly to have failed in. In that we are disappointed. It is said the circumstance that only electors, in the sense of full suffragists, are competent to petition for submission of the bonding proposition "has no material or persuasive bearing. It does not indicate any intention by the legislature to deny to any constitutional elector his right to vote at the election which might be rendered necessary by the filing of the petition." Why it is not material or persuasive as to the legislative intention the opinion is entirely silent. On that we have mere naked judicial assertion. I must assume that the explanation of that is the difficulty of assigning any logical reason: the same difficulty that the learned counsel for respondents experienced on the oral argument. I make no claim that it indicates a legislative intention to deny to any constitutional elector his right to vote. The claim is that women are not constitutional electors, except in a very limited sense, and that they were not in the legislative mind in framing the act in question.

Now it would seem very plain that when the law says that a proposition shall be submitted to the electors for their decision upon a petition being made therefor by ten per cent. of the electors who voted at the last previous state election, and that is what the law in question obviously says about as plainly as words could express a matter, electors at the initiative, by necessary implication, must be the same as electors to make the choice. To say that the former must be full

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suffragists and the latter need not be, to my mind is highly illogical: is to place by arbitrary construction an element in the statute not placed there by the legislature.

I see materiality and persuasiveness to a high degree in the circumstance that only full suffragists are competent under the law to petition for submission of the bonding scheme. I see that because of the seeming unreasonableness in the idea that one may be an elector for the purpose of voting on the bonding proposition, and not for the purpose of petitioning for submission thereof to the electors. To my mind such circumstance indicates the legislative intent, because the class denominated electors are so tied with that denominated voters who may petition, as to show with all the certainty of express declaration that one is synonymous with the other. The confession that members of that one class only can properly petition for the referendum is tantamount to a confession that only members of that one class can participate in responding by voting on the proposition. The one follows the other, to my mind, by irresistible logic.

Now a word about the query of my brethren as to whether the legislature has power to provide for an election at which only a certain part of the electors recognized by the constitution shall be allowed to vote. I am a little at a loss to see the bearing of that. Perhaps since my brethren went no further than to venture the query, I should pass the matter unnoticed, but I will treat it briefly. The constitution does not recognize women as voters except in a very limited sense at "elections pertaining to school matters." As such elections concern, if I am right, only the choice of school officers, the court's query is entirely outside the case. If it be referable to sec. 943 as amended by the act of 1903, in connection with the assumption that the issuance of municipal bonds pertains to school matters, then there is no great doubt of authority that it is competent for the legislature to limit the right to vote in municipalities as to their mere local matters, relating

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to the imposition of public burdens and the regulation of property, to those having special qualifications, in the absence of any constitutional prohibition in that regard. On this the following are in point: *McGraw v. Greene Co.* 89 Ala. 407, 8 South. 852; *Murdock v. Weimer,* 55 Ill. App. 527; *Scott v. Twombly,* 20 Misc. (N. Y.) 652, 46 N. Y. Supp. 1084; *State v. Woodruff,* 2 Day, 504; *Hanna v. Young,* 84 Md. 179, 35 Atl. 674. In the last case cited the constitutional feature was particularly considered and passed upon. *State v. Williams,* 5 Wis. 308, is not inconsistent therewith.

There are other cogent and important reasons for the position I maintain. However, since those already given at length seem amply sufficient to justify my dissent from the decision of the court, I will not further discuss the case.

KERWIN, J. I concur in the foregoing opinion of Mr. Justice MARSHALL.

ZITSKE, Respondent, vs. GROHN, Appellant.

March 26—April 17, 1906

Evidence: Mental conclusion: Appeal: Exceptions: Contracts: Meeting of minds.

1. **The question being whether defendant had agreed to pay plaintiff a commission for procuring a purchaser for certain land, it was error to permit the purchaser, as a witness, to give his mental conclusion as to plaintiff's relation to the sale.**
2. **A general exception to the refusal to give several requested instructions is not available if any of such instructions were incorrect.**
3. **To warrant a jury in finding the existence of an oral contract the evidence must show that the minds of the parties met on the same proposition, but it is not necessary that they should have met "on express words clearly expressed."**

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

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E. V. Werner, for the appellant.

For the respondent there was a brief by *F. Y. King,* attorney, and *R. N. Van Doren,* of counsel, and oral argument by *Mr. King.*

WINSLOW, J. The plaintiff sued to recover a commission upon the sale of real estate. He claimed that the defendant orally agreed that, if he produced a purchaser for a certain eighty acres of land owned by defendant, he (plaintiff) should have all it sold for over $1,200 as his commission. The defendant admitted having a conversation with the plaintiff about the sale of the land, but denied any agreement to pay a commission, and claimed that plaintiff simply inquired the price of the land, and he told him $1,200, and that the conversation took place on Sunday. It was undisputed that shortly afterward the plaintiff produced one Thompson, to whom the defendant sold the land for $1,500, and that the defendant had refused to pay plaintiff any commission. The jury returned a verdict for the plaintiff for $300 and interest, and from judgment on the verdict the defendant appeals.

Several rulings upon evidence are assigned as error, but we find but one which can be considered as prejudicial or which deserves discussion. The question at issue was whether the commission agreement was made. There was no doubt that the plaintiff actually produced a purchaser. Thompson, the purchaser, was called as a witness for the plaintiff. After testifying that he and *Zitske* went to see the land with *Grohn,* and that he negotiated with *Grohn* and finally bought it for $1,500, he was asked by plaintiff's counsel what he understood at that time as to *Zitske's* relations to the land and to the defendant in the deal. This question was objected to as incompetent and as calling for a conclusion, and the objection was overruled, and he answered that he understood that he (plaintiff) had the sale of the land. This was certainly prejudicial error. The witness was allowed to

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give his mental conclusion as to the disputed fact in the case. He had already stated that he did not remember that *Grohn* said anything about *Zitske;* but, even if anything had been said, it would not be competent for him to give his conclusion as to *Zitske's* relation to the sale, but simply to testify to what was actually said and done. It was for the jury to say what conclusion should be drawn from the acts and words of the parties. This is elementary. The answer allowed the witness to usurp, so far as he could, the province of the jury, and was necessarily prejudicial.

It will not be necessary to reproduce the charge of the court, as there were no exceptions taken to it. Several additional instructions were asked by the defendant, which were refused *in toto,* and a general exception was taken to this blanket refusal. If any of the instructions so requested were incorrect, there was no error which can be successfully urged where the exception is general. *Racine B. Mfg. Co. v. Konst,* 51 Wis. 156, 7 N. W. 254. One of these instructions was as follows:

"If the parties' minds did not meet on express words, clearly expressed, and if the conditions were not assented or consented to by both parties at the same time and in the same sense, then there was no contract and you should find for the defendant."

This instruction lays down entirely too strict a test as to what is necessary in order to find the existence of a contract by parol. It is true that the evidence must show that the minds of the parties met on the same proposition, but it cannot be said that it is necessary that they meet "on express words clearly expressed." Oral contracts are frequently found to exist where the words used were not clearly expressed, or were ambiguous, or where some elements are left to implication. There must be words and acts justifying the conclusion that the minds of the parties met and agreed on the same proposition, but it is not necessary that the words

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used be always clearly expressed. They may have been ambiguous or uncertain, and yet, if it can be determined from the words, viewed in the light of the acts of the parties and the surrounding circumstances, that the minds of the parties met, there will be a contract. Had a proper instruction been requested upon this proposition, it should certainly have been given, because the matter was not covered by the general charge, and the case is one where such an instruction was peculiarly appropriate. As the record stands, however, there was no error in this respect.

By the Court.—Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., took no part.

UNITED STATES HEATER COMPANY, Respondent, vs. JENSS, Appellant.

March 26—April 17, 1906.

Sale: Guaranty of payment: "Rated capacity" of boiler: Burden of proof: Expert testimony: Court and jury.

1. The term "rated capacity" of a boiler, as used in a contract relating to a heating plant, is *held*, upon the evidence, not to refer to the efficiency of the boiler to warm the building satisfactorily, but to refer merely to the theoretical capacity of the boiler according to the customary way of rating such articles by dealers to the trade.
2. In an action upon a contract by which defendant guaranteed payment for a heating plant sold by plaintiff to a third person, it being stated in the contract that plaintiff was not to be held responsible in connection with the installation except as to the rated capacity of the boiler, the burden was upon the defendant to show that the boiler did not have the rated capacity agreed upon.

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3. **The question as to the proper theoretical rating of a boiler was one within the field of expert inquiry; and evidence of confessedly nonexpert witnesses, whose method of measurement was, according to the undisputed credible expert testimony, wrong and entirely unlikely to show the proper rating of the boiler, was insufficient to carry the question to the jury as against expert testimony on the other side.**

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover on a guaranty.

Plaintiff sold a heating plant to Ed. LaLonde & Son, to be placed in a building belonging to the defendant, who in writing guaranteed payment therefor to the extent of $475, in this form:

"*United States Heater Company,* Chicago, Ill.:

"I hereby guaranty to you payment for the No. 626 Capital steam boiler, also radiators and other heating supplies to be placed in my building at Antigo, Wis., by Ed. LaLonde & Son, of Antigo, Wis., and in accepting this security it is understood you are in no way held responsible in connection with the installation of this system except as to the rated capacity of the boiler; payment for the same is to be made not later than sixty days after shipment, total amount of bills not to exceed $475. A. JENSS."

The action was on the guaranty, the complaint merely stating the fact of the sale of the heating plant to the LaLondes; that the defendant in writing secured the payment of the purchase price, not exceeding $475, promising, on the failure of the LaLondes for sixty days after the debt for the plant became due to pay therefor, to make such payment in their stead, not exceeding the sum named, and that default by them had been made for the said period of sixty days, and that the amount due for the plant was $459.66.

The defendant answered to this effect: Plaintiff agreed to sell the LaLondes a boiler and heating apparatus, to be installed in his house, which should be of sufficient capacity to properly warm the same at all seasons of the year. The

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consideration for the guaranty was such agreement. The plant proved wholly insufficient to properly warm the house. It is not worth to exceed $200. If it were as agreed upon it would be of the value of $700. As soon as defendant, by test, discovered that the apparatus was insufficient as aforesaid, he refused to accept the same as satisfying the contract requirements. The same facts were pleaded as a counterclaim, with some special matters, closing with a prayer for judgment for $662.50. To the counterclaim a reply was duly made.

Evidence was offered on behalf of plaintiff establishing *prima facie* all allegations of the complaint not admitted by the answer, except that such matters as were only pleaded, if at all, inferentially, were made to appear in their true character by evidence. At the close of plaintiff's case a motion was duly made for a nonsuit, upon the ground that the evidence was insufficient to show any right of recovery.

Evidence was offered on behalf of the defendant, some being received and some rejected, to show that the contract between plaintiff and defendant's vendees, the LaLondes, was for a heating plant of the character stated in the answer. Evidence was also offered, but generally rejected, as to the other defensive matter, the court holding that the defendant was liable under the guaranty, contingent upon the rated capacity of the boiler being as represented, to wit, 1,000 square feet of heating surface; that the term "rated capacity" in the guaranty referred to that and not to the efficiency of the boiler as regards warming defendant's house.

There was evidence, further, to this effect: All heating boilers are rated on the basis of grate and boiler surface, exposure to heat, and hard coal for fuel. Plaintiff rated the boiler in question in the regular way, on that basis, at 1,000 feet. The boiler was sold upon its rated capacity, as usual, fitted up for hard coal as fuel. A witness who confessed inexperience in such matters, and want of knowledge of the

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proper method of measuring a boiler for determining its rating, testified that the exposed surface to heat of the one in question was 76.81 square feet. In connection with that there was evidence that on such basis the proper rating of the boiler, with hard coal for fuel, would be 430 feet. In that connection there was undisputed expert evidence to the effect that the method of measuring the boiler, resulting as aforesaid, was so unreliable as not to furnish any proper basis whatever for determining the proper rating of the boiler.

At the close of the evidence the court, on motion, directed a verdict in plaintiff's favor for the amount claimed by plaintiff, with interest.

For the appellant there was a brief by *Foster & Morson,* and oral argument by *O. H. Foster.*

For the respondent there was a brief by *Finucane & Conway,* and oral argument by *A. C. Conway.*

MARSHALL, J. The case turns, first, on the meaning of the term "rated capacity" as used in the guaranty; second, on whether there was a breach of the agreement as to the "rated capacity" guaranteed.

The learned circuit court, it seems, decided rightly in holding that the term mentioned had no reference whatever to the subject matter of the defense, viz., the efficiency of the boiler, when set up with proper connections, to satisfactorily warm appellant's house. The evidence shows quite conclusively, as the words in themselves pretty clearly indicate, that such term refers merely to the theoretical capacity of the boiler according to the customary way of rating such articles by dealers, to the trade. We shall not take time and space to discuss the evidence in detail. It is all one way, to the effect that heating boilers, generally, are put upon the market by dealers as having each a stated capacity, the rating being based on the idea that a square foot of boiler and grate surface exposed to heat is convertible into a certain heating

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surface of radiators and connections, the amount varying according to the kind of fuel used, hard coal being the standard.

So the verdict was properly directed for plaintiff, unless there was evidence to carry the question to the jury, of whether the boiler was in fact theoretically rated at 1,000 square feet of heating surface, as was supposed at the time the guaranty was made. As to that the burden was on defendant to prove the negative. He failed to produce any definite evidence in support thereof. There was evidence, as is indicated in the statement, that according to a method of measurement and computation applied and testified to, the appellant's rated capacity was too high. But since the evidence was given by confessedly nonexpert witnesses, the subject was clearly within the field of expert inquiry, and there was undisputed credible expert evidence that such method was wrong, and entirely unlikely to show, with any reasonable degree of accuracy, the proper rating of the boiler; there was no proof whatever at the time the verdict was directed, supporting the claim of the appellant. On the other hand, there was considerable evidence of an affirmative character that the boiler had a legitimate rating in harmony with that for which it was sold; not evidence based on measurement and computation, it is true, but on evidence of one familiar with boilers to the effect that the grate surface and size of the boiler indicated that the rating given to it by respondent was correct. There was no evidence upon which the jury could have found in favor of the appellant.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

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McGeehan, Respondent, vs. Bedford, Appellant.

March 26—April 17, 1906.

Justices' courts: Jurisdiction: Docket entries.

1. In order that a justice's docket should establish the invalidity of his judgment it must fail to establish some fact which is not only essential to jurisdiction but which the statute requires shall be entered upon the docket.
2. Failure of the docket to set forth fully the return of service is immaterial where it shows that defendant appeared generally in the case.
3. A statement in the docket that plaintiff "filed written complaint showing an indebtedness of $90" satisfies the requirement of sec. 3574, Stats. 1898, that where the pleadings are written the docket shall contain "a brief statement of their nature and reference to the pleadings filed."
4. There being no statute requiring entry of the fact that evidence was given to support the judgment, the omission of such entry from the docket does not of itself establish that the judgment is void.

Appeal from an order of the circuit court for Shawano county: John Goodland, Circuit Judge. *Affirmed.*

Appellant having purchased certain real estate from one Fuller in 1901, the plaintiff in May, 1905, caused to be issued and levied thereon an execution under a judgment of a justice of the peace entered March 3, 1900, transcript whereof was docketed in circuit court May 29, 1900, but of which appellant had no actual knowledge at the time of purchasing the land. Appellant thereupon moved, upon notice, for an order striking said transcript and all entries relating thereto from the files of the circuit court, and for such other relief as might be equitable, and procured temporary restraint of proceedings under the execution until further order. The motion was based upon alleged want of jurisdiction in the justice of the peace to render the judgment appearing by the justice's docket, which stated the issue of the summons February 13, 1900; "summons duly served, returned, and

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filed February 24, 1900; case called, and on motion of defendant adjourned until March 3, 1900, at 2 o'clock," at the justice's office in Shawano. March 3d: "Case called. Plaintiff present by H. C. Drier, his attorney, who filed written complaint showing an indebtedness of $90, besides the interest to the amount of $6.30, of which no part has been paid. Court waited one hour. Defendant did not appear. It is therefore ordered and adjudged that the plaintiff shall have and recover of the defendant the sum of $96.30, principal and interest, besides the costs," etc.

After hearing, and upon further affidavits, order was entered denying such motion, from which said *Bedford* appeals.

For the appellant there was a brief by *C. H. McDonald* and *E. V. Werner,* and oral argument by *Mr. Werner.*

For the respondent there was a brief by *Wallrich, Dillett & Larson,* and oral argument by *C. F. Dillett.*

DODGE, J. In order that a justice's docket should establish the invalidity of his judgment it must fail to disclose some fact which is not only essential to jurisdiction but which the statute requires shall be entered upon the docket. *Crate v. Pettepher,* 112 Wis. 252, 87 N. W. 1104. Three such facts are urged by appellant:

1. The return of service is not fully set forth. If that be conceded, as also that the statute requires it, still the omission does not invalidate the judgment, for the fact is rendered unessential to jurisdiction by the further fact, duly docketed, that defendant appeared generally and requested adjournment, thus conferring jurisdiction of his person. *Cron v. Krones,* 17 Wis. 401; *Griswold v. Nichols,* 111 Wis. 344, 87 N. W. 300.

2. Failure to state on the docket the nature of the action, so as to show a subject within the justice's jurisdiction. The entry is that the written complaint filed presented a claim for an "indebtedness" of $96. The sufficiency of this, even

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upon oral complaint, is strongly intimated, if not authoritatively decided, in *Sullivan v. Miles,* 117 Wis. 576, 580, 94 N. W. 298. When, however, such description of the cause of action is, as here, supplemented by reference to a written complaint filed, the statutory requirement of "a brief statement of their [pleadings'] nature and a reference to the pleadings filed" is fully satisfied. *Ruthe v. G. B. & M. R. Co.* 37 Wis. 344; *State ex rel. Kaltenbach v. Shiel,* 114 Wis. 256, 90 N. W. 112; *Sullivan v. Miles, supra.*

3. The omission to state on the docket the fact that evidence was given to support the judgment. If it be conceded that the taking of some evidence is essential to jurisdiction to render judgment (*Roberts v. Warren,* 3 Wis. 736), yet no statute requires the fact to be entered on the docket; hence omission of such entry does not of itself establish that the judgment is void. *Crate v. Pettepher, supra.*

No other ground of invalidity is suggested. Therefore the court properly refused to strike from its files the justice's transcript and entries in relation thereto, even if such relief might, under any circumstances, be accorded one not a party to the judgment.

By the Court.—Order affirmed.

CASSODAY, C. J., took no part.

KOLPACK, Respondent, vs. KOLPACK, Appellant.
SAME, Appellant, vs. SAME, Respondent.

March 27—April 17, 1906.

Judgment: **Res judicata:** ***Persons bound: Easements: Private way: Prescription.***

1. **A., being interested in having it determined that a certain road or track over B.'s land was a public highway, procured the bringing of an action in the name of the state against B. to recover**

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the statutory penalty for obstructing such alleged highway. The district attorney was afterwards called into the case, but did not interfere with its management and prosecution by A. and his attorney. The court found and adjudged that the road was not a public highway. *Held*, that although A. was not a party to the record in that action, the judgment therein was binding upon him in a subsequent action against him brought by B. to restrain him from passing over said road and from removing barriers placed therein.

2. The evidence in this case is *held* not to sustain a finding of the trial court that defendant had a prescriptive right to a private way across plaintiff's land.

APPEALS from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed in part.*

This action was brought by the plaintiff to restrain the defendant from passing over and removing barriers from lands owned by plaintiff and described as follows: The northwest quarter of the southwest quarter of section 1, township 28 north, of range 12 east, Shawano county, Wisconsin. The defendant owned lands east of plaintiff's, which he purchased in 1878, at which time there was a traveled track across the plaintiff's land commencing near the northeast corner thereof and running in a zigzag direction across it and intersecting the highway on the west side thereof. This track the defendant claimed the right to use as a public highway. The plaintiff alleges in his complaint ownership of the property, and that there is a private road passing over it commencing at a point about four rods south of the northeast corner of the premises and thence running diagonally in a southwesterly direction to a point about thirty-three rods north of the southwest corner thereof, and that no highway had ever been laid out along or near said private road, and that the defendant or the public had acquired no right to use the same; that no dedication to the public had ever been made by the plaintiff or any former owner of the premises, and that the defendant had acquired no right to use said private road; that for about

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three years last past the defendant had used said road against the objection of the plaintiff and in defiance of his rights, to the injury of the plaintiff; that in June, 1901, plaintiff constructed fences across said road and placed obstructions thereon and notified defendant to desist from using the same; that defendant removed the fences repeatedly and continued to use the road against the protest of plaintiff, and continued to commit acts of trespass daily; that the action is commenced to prevent such trespass and a multiplicity of suits and for general relief.

The defendant answered admitting the plaintiff's ownership of the property, the removal of the fences and obstructions by defendant, and alleged that the road in question was a public highway and had been used for more than ten years prior to the alleged trespass, and during such time had been worked and kept in repair by the town officers as a public highway. Defendant further alleged his ownership of the 160 acres of land adjacent to the plaintiff's premises, and that he had used the highway in question for twenty-four years and had constructed buildings on his premises with reference to said highway, and further denied generally the allegations of the complaint, and prayed that said highway be adjudged a legal highway and that the plaintiff be enjoined from placing within the limits thereof any obstructions to public travel.

The court found that the plaintiff was the owner of the premises in question and that there was a traveled track running diagonally across the same; that in 1878 defendant lived on the farm east of the plaintiff, and in 1881 the town board of the town in which plaintiff's premises are situated attempted to lay out a highway across his premises substantially following said traveled track; that said traveled track had been used by defendant since 1878, and that such use was commenced with the express permission and consent of the plaintiff; that in 1885 plaintiff informed defendant that he must procure another road; that since 1901 plaintiff has

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frequently built fences and obstructions across said road which have been removed by defendant; that since 1881 defendant has been using the traveled track under claim that the same was a public highway; that said traveled track has never been used by any one, except defendant and his family and those going to see them, since 1881; that in 1902 an action was commenced under sec. 1326, Stats. 1898, to recover the statutory penalty for obstructing a public highway; that the defense that the *locus in quo* was not a highway was pleaded, and the defense brought the title to land in question and the case was removed to the circuit court and tried, the only contested question being whether the traveled track or road was a highway; that it was determined in said action that said track or road was not a highway, and no appeal was taken; that the defendant procured the bringing of said action and prosecuted the same to final judgment, and employed and paid an attorney for such purpose.

The court found, as conclusions of law, that the traveled track was not a public highway, but that the judgment in the action to recover the penalty was not *res adjudicata* in this action, and not binding upon the defendant; that the traveled track was a private way of defendant, and that he had a prescriptive right to use the same, and that plaintiff had the right to construct gates and bars across said traveled track as his convenience in farming might require, the same to be closed by the defendant, his agents and servants, after passing through the same; that the plaintiff was not entitled to an injunction restraining defendant from using the traveled track.

Judgment was entered upon these findings accordingly. Plaintiff appealed from so much of the judgment as gave the defendant a private way by prescription across the premises in question, and also from the portion which denied costs to either party. The defendant appealed from the portion giving the plaintiff the right to erect such gates or bars across the private way as his convenience in the use of such

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premises might require, and adjudging that the defendant, his agents and servants, should close such gates after passing through the same; also from the portion adjudging that said private way was not a public highway.

For the plaintiff there was a brief by *Wallrich, Dillett & Larson,* and oral argument by *C. F. Dillett.*

For the defendant there was a brief by *B. A. Cady* and *Kreutzer, Bird & Rosenberry,* and oral argument by *C. B. Bird.*

KERWIN, J. 1. The question whether there was a public highway was litigated and evidence produced upon that issue. The court ruled out the record of former adjudication to the effect that no highway existed, and found upon other evidence that there was no public highway. We do not deem it necessary to review the evidence upon the question of whether a public highway was laid out or acquired by user in the manner provided by law, since we are convinced that the record offered in evidence established the fact that no highway existed at the place in question at and prior to the time of the commencement of the instant suit, and that the judgment in such action is binding upon the defendant here. The evidence shows, and the court found, that in October, 1902, and before the commencement of the present action, an action was commenced against the plaintiff under sec. 1326, Stats. 1898, to recover the statutory penalty for obstructing the alleged highway in question, and that plaintiff set up the defense that the *locus in quo* was not a highway, but his private property. The action was commenced in justice's court and a plea of title to land put in and the case duly transferred to the circuit court for Shawano county, where it was tried, the only question litigated being whether a highway existed at the place in question. The court held that it did not, and judgment was entered accordingly, which judgment was in force at the time of the trial of this action. It is also estab-

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lished that the defendant procured the bringing of such action and prosecuted the same to judgment, and employed and paid an attorney for such purpose, and was interested in the litigation in an effort to determine that a public highway existed. It appears from the record that the court below concluded that the judgment in the former action was not binding upon him, since he was not a party to the record, the action being prosecuted in the name of the state against the plaintiff. The court, however, found that the private track in controversy was not a public highway, obviously upon the theory that the evidence did not establish that the highway had been legally laid out or acquired by user.

Upon the facts established, the former judgment for recovery of the penalty for obstructing this highway determined in favor of the plaintiff was binding upon the defendant. He had an interest in such controversy in establishing that a highway existed, and took part in the suit, employed and paid an attorney, and managed the litigation because of such interest. While the district attorney acted with the attorney for defendant, it appears that the defendant's attorney was in no way hampered in the conduct and management of the suit. It is established that the road in question had never been used by any one except the defendant and his family and those going to see them, and that defendant was the real party in interest in establishing whether or not a public highway existed, and carried on the litigation for that purpose. He commenced the action in justice's court without the intervention of the district attorney, who was afterwards called in because counsel for plaintiff objected to the prosecution of the action without his presence, and required the notice of trial to be signed by him. But the appearance of the district attorney in the case, as appears from the record, in no manner interfered with the management and prosecution of the case by the defendant and his attorney. It does not appear

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from the record that the right of appeal was denied the defendant, and it must be presumed from the fact that the district attorney consented to the prosecution of the action and the carrying on of the litigation and co-operation with the defendant that it was not denied, but on the contrary would be authorized by the district attorney and prosecuted if the defendant so desired.

Claim is made by counsel for defendant here that the findings in the former action to the effect that the *locus in quo* was not a public highway are not sustained by the evidence, for the reason that the court applied a different rule of evidence than in civil actions, and made remarks to the effect that if he were trying the direct question he would hold it a public highway, or he did not know what he would hold on that point. But the findings and judgment of the court in that action must control here, and cannot be set aside or modified by remarks of the court not embodied in the findings or the judgment or intended to be. Moreover, the circuit judge below who tried this action tried the former, and in his finding in this action states that the only contested question in the former action was whether the road was a highway, and that it was found and determined in said former action that it was not a highway, and for that reason the complaint was dismissed upon the merits. So there seems to be no room for doubt from the record on the former suit in evidence, as well as the findings and record in the present suit, that the question of highway was litigated and determined upon the merits against the defendant in the former action, and that although the defendant was not a party to the record he is, upon well-established principle, bound by the judgment. *Fulton v. Pomeroy,* 111 Wis. 663, 87 N. W. 831; *Boyd v. Wallace* (N. Dak.) 84 N. W. 760; *Cramer v. Singer Mfg. Co.* 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds,* 99 Fed. 286, 39 C. C. A. 528; *Bennitt v. Wilmington S. M. Co.* 18 Ill. App.

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17, 7 N. E. 498; *Cole v. Favorite*, 69 Ill. 457; 2 Black, Judgments (2d ed.) §§ 539, 540; Herman, Estoppel, § 148; 2 Van Fleet, Former Adj. § 523.

2. The court found a private way by prescription over the road in question, and adjudged that the plaintiff may erect such gates or bars across said private way as his convenience and use of the premises may require, and that the defendant, his agents and servants, shall close such gates after passing through, and entered judgment accordingly. As appears from the statement of facts and the findings, the question of private way by prescription was raised by the pleadings and litigated upon the trial, but we are satisfied from a careful examination of the evidence that there is no evidence to support the findings that a private way by prescription in favor of the defendant was established. It is established that the defendant commenced using the private track in question in 1878, before any attempt had been made to lay out a highway, and continued to use the same until 1885 with the permission of the plaintiff, and that in 1885 plaintiff told defendant to procure another road. There is, therefore, no evidence of any adverse user by the defendant sufficient to ripen into a prescriptive right for the requisite period before the commencement of this action. We therefore hold that there is no public highway over the premises in question, nor a private way by prescription.

By the Court.—That part of the judgment appealed from by the plaintiff is reversed. The defendant will take nothing on his appeal. Plaintiff is allowed costs in this court on both appeals. The cause is remanded to the court below with directions to modify the judgment in accordance with this opinion, so as to give the plaintiff the full relief prayed for in his complaint, including costs against the defendant.

CASSODAY, C. J., took no part.

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MENASHA WOODEN WARE COMPANY, Appellant, vs. HARMON, Respondent.

March 27—April 17, 1906.

Best evidence: Letter-press copies: Tax titles: Attempt to redeem: Error of county clerk: Constructive redemption.

1. Original letters and letter-press copies thereof are not regarded as duplicates, and such copies are not admissible in evidence where it is not shown that the originals are not in existence or cannot be produced, even though it appears that they were written to a third person and are not in the possession or under the immediate control of the party offering the copies.
2. Where the failure to redeem lands from a certain tax sale was as much due to the fault and neglect of the redemptioners in failing to call the attention of the county clerk to such sale as it was to the fault of the clerk in omitting that sale from his statement of the amount required to redeem, it was error to hold that there had been a constructive redemption from that sale.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action in equity to quiet plaintiff's title to the southeast quarter of section 10, township 33, range 13. The land, now in Langlade county, was formerly included in Oconto, and thereafter in Shawano, county. The complaint alleges that the plaintiff is a duly organized corporation of this state and is the owner in fee simple of this land, and that defendant claims to own an interest therein adverse to the plaintiff, and prays judgment that its title be established against any claim of the defendant, and that he and those claiming under him be barred from having or ever claiming any right or interest in the land adverse to plaintiff, and that he be directed to release all claim to the same. Defendant denies that the plaintiff is the owner of the land as averred, and alleges that he owns it in fee through conveyances forming a complete chain of title, beginning with the patent title. He also alleges that plaintiff's title is based on certain tax deeds, and

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that the land was redeemed from the tax sales upon which such deeds were issued, and he demands judgment establishing his title against the claim of plaintiff, and that it be barred from having or claiming any right or title to the land adverse to him, and that it release all claim thereto.

The court tried the action and found that on the 4th day of April, 1881, G. W. Washburn was the owner of the land, and that he and his wife, Sarah P. Washburn, on that day, in consideration of love and affection, and as a gift, conveyed these premises and other lands to their daughter, Clara W. Morgan, in trust for the use and benefit of her children, Mary and Franklin B. Morgan, born, respectively, December 27, 1877, and December 20, 1880, and that this trustee and her children conveyed this land to the defendant October 21, 1903, to secure him for money advanced to redeem it from outstanding taxes, tax certificates, and tax deeds. It appears that the land had been sold for delinquent taxes for nearly all of the years from 1878 to 1899, the year wherein redemption was made for Mary Morgan. The evidence shows that G. W. Washburn acted for the trustee and beneficiaries under the trust deed. He was the original owner of the land, and had knowledge that the taxes levied after 1876 and prior to the date of the trust deed (April 4, 1881) had not been paid by him or any one on behalf of the trustee and the beneficiaries, and he had good grounds for apprehending that no one had paid the taxes levied upon the land after the delivery of this trust deed and up to the year 1899, when he, as agent of the trustee and beneficiaries, took steps to redeem from all tax sales. There was no actual redemption from the sale of 1880 as to the land in question. The court found that the failure to redeem from the sale of 1880 was due to the omission of the county clerk to include it in the statement he furnished in response to Mr. Washburn's letters asking for the amount which would be required to redeem this and other lands in 1899 and 1902. It is shown that Mr. Washburn had per-

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sonal knowledge that no taxes had been paid on this land since 1876; that before asking for this statement from the county clerk in November, 1899, he had secured an abstract of title which contained a reference to the tax deed under which plaintiff acquired its title; that he did not examine the clerk's statement to ascertain what descriptions it covered and for what years the taxes were included; and that he did not compare the contents of the statement with the abstract to ascertain if all the delinquent taxes shown by the abstract were included. He concedes that he did not compare the clerk's statement or the redemption receipts with the abstract to ascertain whether all descriptions and sales were included. It seems that the clerk's omission was due to a change in the office practice, the clerk no longer referring to the original book entries showing sales for delinquent taxes to ascertain the years and amounts for which lands were sold, but using a "tax abstract" compiled in the clerk's office and including no sales prior to 1883. The original books showing the sale of 1880 were, however, readily accessible, and the entries of such sales were easily found by the clerk when called for. Mr. Washburn did not call the clerk's attention directly to the fact that he wished to redeem from the sale of 1880 when he called for a statement of the amounts due or when he remitted the taxes and charges pursuant to such statement.

The court held that there was a constructive redemption, and that plaintiff had no title or interest in the premises, and awarded judgment establishing defendant's title and for costs. This is an appeal from such judgment.

For the appellant there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *J. R. North.* They argued, among other things, that the failure to redeem from the sale of 1880 was due to the negligence of the redemptioners and not to the exclusive fault of the county clerk. In all of the Wisconsin cases where a constructive redemption or payment has been upheld, the landowner, in applying to the

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public officer, has specified the year which he wished to pay the tax for or redeem from. *Randall v. Dailey,* 66 Wis. 285; *Gould v. Sullivan,* 84 Wis. 659; *Nelson v. Churchill,* 117 Wis. 10, 13. If the landowner knows of a sale which the officer has overlooked and fails to apprise him of it, he cannot claim the benefit of the rule. His own negligence will defeat him. *Easton v. Doolittle,* 100 Iowa, 374; *Noble v. Bullis,* 23 Iowa, 559; *Bray & Choate L. Co. v. Newman,* 92 Wis. 271, 276; Cooley, Taxation (2d ed.) 540, 541; *Lamb v. Irwin,* 69 Pa. St. 436, 443; *Harrison v. Owens,* 57 Iowa, 314.

For the respondent the cause was submitted on the brief of *Hume & Oellerich,* attorneys, and *Barbers & Beglinger,* of counsel. They contended, *inter alia,* that there was a constructive redemption from the sale of 1880. Washburn in behalf of the minors sent more money than necessary to redeem from this sale and deed to the county clerk of Shawano county. The excess, $33.13, the clerk returned to Washburn, stating that he had made redemption from sales of 1884 and 1885, which were the only sales of these lands in Shawano county. See *Loomis v. Pingree,* 43 Me. 299; *Hand v. Auditor-General,* 112 Mich. 597, 71 N. W. 160; *Wood v. Bigelow,* 115 Mich. 123, 73 N. W. 129; *Hough v. Auditor-General,* 116 Mich. 663, 74 N. W. 1045; *Kneeland v. Hyman,* 118 Mich. 56, 76 N. W. 127; *Hoffman v. Auditor-General,* 136 Mich. 689, 100 N. W. 180; *Tacey v. Irwin,* 18 Wall. 549; *Merton v. Dolphin,* 28 Wis. 456; *Bubb v. Tompkins,* 47 Pa. St. 359; *Dietrick v. Mason,* 57 Pa. St. 40; *Gould v. Sullivan,* 84 Wis. 659; *Randall v. Dailey,* 66 Wis. 285; *People ex rel. Cooper v. Registrar,* 114 N. Y. 19; *Hintrager v. Mahoney,* 78 Iowa, 537; *Pottsville L. Co. v. Wells,* 157 Pa. St. 5; *Lewis v. Monson,* 151 U. S. 545; *Nelson v. Churchill,* 117 Wis. 10; Cooley, Taxation (2d ed.) 367; *Gage v. Scales,* 100 Ill. 218; *Martin v. Barbour,* 34 Fed. 701.

A brief was also filed by *Reid, Smart & Curtis, amici curiæ.*

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SIEBECKER, J. The court received letter-press copies of letters in evidence over objection. An exception is urged to this ruling. The copies received were of letters Mr. Washburn had sent to the county clerk asking for a statement of all unpaid taxes on the lands involved. They were objected to upon the ground that there was nothing to show that the originals were not in existence and that they could not have been produced if proper steps for their production had been taken. The circumstances do not disclose but that the originals were in existence in the custody of the county clerk, and under a proper subpœna could have been brought into court. True, defendant shows that they were not in his possession or under his immediate control; but, although the right to subpœna the custodian and to demand their production for the purposes of evidence is not questioned, he failed to do so. Under such circumstances no proper foundation is shown entitling him to offer copies as the best obtainable evidence on the subject. *Newell v. Clapp,* 97 Wis. 104, 72 N. W. 366; *Diener v. Schley,* 5 Wis. 483. The original letters and letter-press copies are not regarded as being duplicates. 2 Wigmore, Ev. § 1234, subd. 2, and note 3; *State v. Halstead,* 73 Iowa, 376, 35 N. W. 457; *Seibert's Assignee v. Ragsdale,* 103 Ky. 206, 44 S. W. 653.

It is contended that the court erred in holding that there was a constructive redemption from the sale of 1880, upon the ground that the evidence is clear that the failure to redeem from this sale is directly attributable to the fault and neglect of Mr. Washburn in his attempt, as agent of the trustee and the beneficiaries, to redeem from all outstanding tax sales and deeds. From the facts above stated it is clear and without dispute that Mr. Washburn had sole and full charge of the business of the redemption of these lands from the tax sales. He had personal knowledge of the fact that no taxes had been paid by or for him for some years immediately preceding the trust deed, and that tax deeds had issued on tax

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certificates. He procured an abstract of the title to this land shortly before he attempted to redeem, and this abstract contained a statement of the tax sale of 1880 and that a tax deed had issued thereon. In his request to the clerk for the amount due for unpaid taxes he included the description in question with others, without specifying the years for which the lands had been sold for taxes. The statement furnished by the clerk included no sale prior to 1883. Washburn made no examination of this statement, nor comparison of it with the abstract in his possession, to ascertain whether it covered and included all unpaid taxes and sales. He likewise omitted to so examine and compare the redemption receipt issued after payment of the amount specified in the clerk's statement; and he at no time, until the time for redemption had expired, specifically brought to the attention of the county clerk the fact that there had been a sale of this land for taxes in 1880. It is manifest that, had he done so, the record of such sale would readily have been discovered in the records of the clerk's office. Under these facts and circumstances it seems obvious that the failure to redeem from the sale of 1880 was fully as much due to the fault and neglect of Mr. Washburn as of the county clerk, and it cannot be said that such failure is wholly attributable to the mistake and negligence of the clerk. Mr. Washburn had personal knowledge that the taxes had not been paid from a time antedating the trust deed up to the time when the clerk furnished this statement. Furthermore, had he examined the list furnished him, or the redemption receipt, or compared them with this abstract, he would have discovered the omission and thereby have obviated all liability of a failure to redeem from this sale. This conduct established the failure to redeem as attributable to the neglect of the redemptioners. Under such circumstances the consequences of such neglect are to be borne by the defendant, upon the ground that "the case presents no other ground of equity than would exist in any case where, through inadvertence or mis-

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apprehension, the party has failed to assert his right in due season; and he will be left by the law where his own negligence or inattention has placed him." 2 Cooley, Taxation (3d ed.) 1049; Black, Tax Titles (2d ed.) § 362; *Easton v. Doolittle,* 100 Iowa, 374, 69 N. W. 672; *Hollinger v. Devling,* 105 Pa. St. 417. We must hold that the court erred in holding that there was a constructive redemption from the sale of 1880 of the land involved. The plaintiff is the owner of the lands described in the complaint, and is entitled to judgment establishing its title and barring defendant from any right or title thereto.

The other questions presented and argued by counsel for the parties, and by counsel who appeared as *amici curiæ*, are not necessarily involved in a final determination of the rights of the parties, and we therefore express no opinion upon them.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in plaintiff's favor in accordance with this opinion.

CASSODAY, C. J., took no part.

MONTGOMERY, Plaintiff in error, vs. THE STATE, Defendant in error.

March 27—April 17, 1906.

Criminal law and practice: Change of venue: Prejudice of people: Former jeopardy: Preliminary examination: Killing of wife: Presumptions from marital relation: Instructions to jury: Manslaughter: Heat of passion: Testimony of accused not conclusive against him: Evidence: Premeditated murder.

1. The denial of a motion for change of venue on account of prejudice of the people of the county is *held* not to have been error, the affidavits as to the fact of prejudice being conflicting.

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2. Where defendant had been arrested on a charge of assault and had pleaded not guilty, but after adjournment and before the trial commenced the case had been *nolled* and defendant discharged, this did not constitute a former jeopardy barring a subsequent prosecution for murder arising out of the same transaction.
3. Defendant was arrested on complaint and warrant charging murder; he pleaded not guilty, and an adjournment was had; on the adjourned day an examination was held and an inquest taken; the justice found there was probable cause to believe defendant guilty of murder, and ordered the proceedings to be stopped, and committed defendant to jail to answer for the offense. *Held*, that there was a sufficient preliminary examination.
4. Upon the trial of one charged with murder of his wife the court properly refused to give an instruction to the effect that there was a powerful presumption, resulting from the marital relation, that the deceased was not killed by her husband or that there was not malice aforethought.
5. A requested instruction should be so drawn that it can be given without change.
6. In prosecutions for serious crimes a requested instruction should not be refused on account of a mere verbal inaccuracy, but the trial court should correct the inaccuracy and give the instruction.
7. The fact that defendant testified positively that he was not angry at the time when he is charged with having killed another person did not so conclude him that he was not entitled to have submitted to the jury the question whether the killing was done in the heat of passion so as to make the offense manslaughter in the second or fourth degree. *Perugi v. State*, 104 Wis. 230, on this point, overruled.
8. Upon the evidence in this case—showing, among other things, that if defendant killed his wife, whose death was caused by dislocation of the vertebræ of the neck, he did so either by a blow upon the neck or by causing her to fall from the buggy in which they were riding in the daytime past the homes of friends and neighbors,—it is *held* that a verdict of premeditated murder was not warranted.

ERROR to review a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

The plaintiff in error, hereafter called the defendant, was convicted before the circuit court for Monroe county of having

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murdered his wife, Blanche Montgomery, on the 30th day of May, 1903, and prosecutes this writ of error to reverse the judgment.

A motion by the defendant for change of venue on account of the prejudice of the people was first interposed and overruled, after which successive pleas in bar and abatement were overruled, and the case proceeded to trial upon a plea of not guilty.

It appeared by the evidence that the defendant was a farmer who lived upon a farm five miles east and a quarter mile north of the village of Warrens, Monroe county, Wisconsin. He was about forty-one years of age at the time of the alleged murder, had been twice married, and lived with his daughter Nina, aged sixteen years, the child of his first wife. He was a man somewhat addicted to the use of liquor, but was not what would be called a drunkard, although he was shown to have committed several minor offenses while under the influence of liquor. His second wife, Blanche Montgomery, the deceased, to whom he was married in the year 1900, was about twenty-five years of age at the time of her death, and weighed about 130 pounds. She was a country school teacher, and appears to have taught school at various places in the vicinity of her husband's residence a considerable part of the time after her marriage. She was a nervous and excitable woman, of uncertain temper. Very little appears as to the relations of the parties after the marriage, but it does appear that the defendant had suspected his wife of infidelity with other men, and had some letters in his possession written by his wife to him, in which she confessed intimacy with other men. Montgomery testified that he never believed these statements, but still it appears that there was some excited talk between them about these matters at times, and that the defendant preserved them and threatened to show them to the father of the deceased.

The school which the deceased was teaching closed on Fri-

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day, May 29, 1903, and the defendant on that day drove from his farm to Warrens, left his team there and went down to Stowell, where his wife had been teaching school, stayed with her all night at Stowell, and on the following day the two came back to Warrens by rail. They arrived at Warrens early in the day and stayed there until late in the afternoon, visiting some friends, Mr. and Mrs. Gray. At about 5:30 o'clock in the afternoon they started for home with a two-horse team hitched to an open single-seated buggy, or road wagon, which had side springs and a high back, but no top. The deceased appeared at that time to be in good health. They had both drunk some beer during the day, and the defendant had a small bottle partly filled with whisky with him, but it did not appear that either of them was intoxicated. The road from Warrens to the defendant's residence ran over a comparatively level piece of ground, and ran straight east about five miles and then turned to the north. There was a slight hill about one-half mile east of Warrens, and at several places on the road there were swampy pieces of ground and the roadway was made of corduroy. Part of the road was exceedingly sandy, but a part was hard. There was a telephone line running from Warrens as far east as the defendant's residence, and telephones at the following residences along the road, viz.: (1) At Beck's, or the "Prairie Farm," one and three-quarter miles from Warrens; (2) at Barden's residence, about a mile further on; (3) at Andrew Scott's residence, about three and one-third miles from Warrens; (4) at Proviance's, about three and three-quarter miles from Warrens; (5) at George Green's residence, five miles east of Warrens; lastly, at the residence of the defendant. These telephones were all on one common line, so that a call by any one on the line would ring the bells in the other houses. The death of Blanche Montgomery was caused by either intentional or accidental violence, which she received upon the

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road home from Warrens, or within a few moments after her arrival at home.

The defendant testified as to this trip substantially as follows: That they started out towards home, and as they went along he, the defendant, commenced to read some letters which they had received in the mail, and that while he was doing this his wife asked for the whisky bottle, which was not over one third full, saying that she felt kind of faint; that she took a drink and he took a drink, and that he threw the bottle away; that then she caught him around the neck with her arms, and told him that she had been wicked, and told him about her improper relations with a man at Stowell; that then he took the letter out of his pocket, and she asked him not to send it to her father, and he told her that if she didn't stop telling so many lies he would send it, and she asked him to destroy it, and he said he was going to keep it, and that she tried to grab it, and when she could not she "clutched" right into his face; that he caught hold of her arm and asked her if she was drunk or crazy, and held her, and she stopped struggling, and after about ten rods she either started to jump out of the buggy or fell out, as the horses were walking, and he jumped out and helped her in, and she acted kind of dazed, and he asked her what was the matter, but she didn't answer; that they then drove along a little ways, when he filled his pipe and lighted it, and she looked as if she was going to faint away, and he put his arm around her and she leaned against him; he started the horses at a trot, and took the whip to start them faster, and as he returned the whip to the socket she pitched right forward and he thought her face struck the "ex" of the buggy near the hub, and she fell onto the ground and the buggy ran over her, and he stopped the team as quick as he could, jumped out, and went back and picked her up; that she had some bruises on her nose and lip, and he led her back to the buggy, and

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when she got close to the buggy she commenced to tear around, tried to get away, and "hollered," frightened the team so that he had to run and catch them and tie them to a telephone post, and his wife started back toward Warrens, and as soon as he got the horses tied he ran and caught her and led her back to the buggy; that she tore her hair and "hollered" some, and that he got her to the buggy after a while and she started toward home and then he got her to the buggy again and she said, "Are we pretty near home?" and he said, "We will be pretty soon," and she climbed into the buggy, and he untied the horses and got in and started for home with the horses on the run; that he knew there was something wrong; that he thought the liquor had gone to her head; that he knew she had hurt herself, and he thought the best thing would be to get her home; that this occurrence was just west of the "Prairie Farm."

He further testified that after she got into the buggy she sat down leaning towards him with her head against him on his right side; that they proceeded until within about three fourths of a mile of defendant's house, near the Green residence, when she raised up and wanted to sit up, and said she felt all right; that her nose was bleeding after she left the "Prairie Farm," and she held her handkerchief to it and the handkerchief became soaked with blood, and he took his own out of his pocket and gave it to her just as they were crossing a bridge near the Green farm, and after they crossed the bridge the team swung off to the right a little; that he straightened the horses up into the road and started up fast, and reached out for the whip, and as he did so his wife fell out of the buggy in between the wheels; that he grabbed for her with his right hand; that his hold broke loose and then he grabbed for her leg; that she finally fell onto the ground and was dragged some distance, the horses running, and that he stopped the horses as soon as he could, and himself fell out of the buggy, the hind wheel passing over him; that he still

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had hold of the lines, and stopped the horses and cramped them across the road, and ran and got his wife, carried her in his arms and lifted her into the buggy on the left-hand side of the seat, and drove towards home holding his wife with her face on his breast; that he drove as fast as he could from there to the corduroy east of Green's, slowed up across the corduroy, and then drove fast till he reached home, and that his wife was unconscious during this time, as he thought. He further testified that when he got home he drove up to the house, and Nina came out, and he took his wife out of the buggy, had one arm around her body, and they walked into the house, and after he got into the house they got some water to wash her face, which was covered with blood; that Nina took care of the team while he bathed his wife's face, and found that her one eye was swelled shut and her face was bruised; that he thought she revived; that he laid her on the bed and went to the telephone and called Dr. Sidell, and told him to come out as quick as he could; that his wife recognized the telephone ring and asked him what he was ringing for, and he said for the doctor; that soon after Nina came in, and his wife called her by name and wanted to get up off the bed, and he helped her out of the bedroom to the water pail; that he thought she used her lower limbs; that she stood on her feet without help; that they gave her a drink of water, and she sat down in a chair, and she asked Nina if she was at home, and spoke of a little colt which she wanted to see, and he told Nina to go and drive the colt up from the pasture, and Nina started out, but just after she started his wife called Nina, and he went to the door and called Nina back, and as he did so his wife, who had been sitting in a chair, fell straight forward out of the chair in a heap, and he picked her up and sat her in the chair, and Nina came in, and he said, "My God, Nina, I believe Blanche is dead or dying; let's take her out into the air;" and they carried her out into the air, and she sat upon the ground with her head upon his arm and

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said, "*Sam,* I did;" that Nina got a pail of water, and he used it on her face and hands, and that she might have lived a minute after they got her out of doors, but not more; that two or three minutes after that Mrs. Cecil Green and her father, Mr. West, came, and then they picked her up and carried her into the house; that he called Mr. Proviance's people by telephone right after his wife died, and they came over. The daughter, Nina, testified to substantially the same state of facts as to what occurred after her father and mother reached home.

Dr. Sidell testified that he was called by telephone, at about half past 7 in the evening, and that the party calling him said, "Come out to *Montgomery's* as fast as God will let you," and he said, "Who is sick?" and the answer was, "My wife," and he said, "What's the trouble?" and the answer was, "Never mind what the trouble is, but come just as fast as you can." That he arrived there about half past 8, and the defendant came from the bedroom with the lamp in his hand, and said, "There is no hope;" that he went into the room, found the deceased lying on the bed, and asked defendant when she died, and he said he did not know, that she quit breathing about the time he 'phoned; that he found the upper lip enormously swollen and cut, left eye and left side of the face swollen badly, also a swelling on the right side above the ear; that the hands were covered with blood, but not bruised; that the skin was not broken, only where cut under the lip a trifle; that the hair was tousled up and mixed with sand and grit, and wet; that the clothing was wet, and her skirt and hose were wet; that he thought the woman had been dead about an hour.

It further appeared that a *post mortem* examination was held on the body on Monday, June 1st, by Drs. Simonson, Moseley, and Sidell. Dr. Simonson testified that he found a large swelling on the left side of the head, and thought it was a fracture, and cut around the skull and pushed the scalp

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back over the face, and then found a large blood clot, but no fracture; that in doing this the body was in a sitting position, and the head fell forward, and he came to the conclusion that there must be a fracture of some of the cervical vertebræ; that there was a large swelling over the eye with a cut; that the lip was very much swollen and incised; that there was a small abrasion on the left ear, and an abrasion on the left arm and right hand, as though the skin was torn off by friction; that they found that the first vertebra—*i. e.* the first bone of the neck—was separated from the second bone about three fourths of an inch, and that the process of the second vertebra, called the "odontoid process," upon which the first vertebra turns the head, was broken off; that if this process is broken off the head will fall forward, and the odontoid process will press on the spinal cord, and there will be, at least, paralysis from that point to the feet at once, or instant death; that a person in that condition could not walk; that the blood clot on the base of the brain was caused by some injury on the top of the head on the left side of the head; that it would be possible to cause this fracture by a severe blow with the fists upon the process or upon the neck, or that it could have been caused by the use of the hands in wrenching the head with great force; that from the conditions found he thought that the deceased could not talk after the injury, not even a word; that he asked *Mr. Montgomery* how this happened, and *Montgomery* said they had a quarrel, and his wife threw herself out of the buggy. Dr. Moseley testified to substantially the same facts, and said he thought it would have been impossible for a person to walk after receiving these injuries, and he didn't think there could have been any power of speech; that the injuries might be produced by a blow or by a fall upon the head; that the most usual manner of producing such injuries is by a fall; that in his judgment the two injuries, the fracture and the dislocation, occurred at the same time; that if the team was moving along rapidly, and

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she struck on her head, the force might be great enough to cause a dislocation of the first and second vertebræ.

Several persons testified that they saw the defendant and his wife upon their trip home. The witness Roy Lamb testified that he saw *Mr.* and Mrs. Montgomery on the road; that *Montgomery's* team was tied to a post near the "Prairie Farm," and when he first saw them they were walking westward toward the buggy, Mrs. Montgomery being about five or six feet ahead; that she got into the buggy, and *Montgomery* untied the team and got in, and they started off on the run, with Mrs. Montgomery on the right side; that Mrs. Montgomery got into the buggy alone, and she kind of leaned over against him. Jacob Beck, a farmer who lived a mile and a half east of Warrens, on what is called the "Prairie Farm," testified that he saw them after they had got about twenty rods past the house, and *Montgomery* was putting the whip on the horses and they were running, and that the defendant was sitting on the right-hand side, and the deceased was kind of stooped or humped over against him. Mrs. Beck testified to the same situation, except that she thought Mrs. Montgomery sat on the right side. Peter Nelson testified that he lived two miles east of Warrens, and saw the Montgomerys as they were driving home, about the middle of a certain piece of corduroy road about eighty rods long; that he had a load of stumps on his lumber wagon and turned out as far as he could, and *Montgomery* turned out on the other side and passed, and then commenced driving fast; that the deceased was sitting on the right side, and was hanging over behind *Montgomery's* back; that her hair was hanging right back, and blood was streaming down her face. Herbert Barden, who lived about three miles east of Warrens, testified that he was standing in the garden with his three daughters, and heard the team coming across the corduroy, and saw *Montgomery* and his wife; that his wife was sitting on the right-hand side, but leaning over, and the defendant spoke to her and said, "Sit up," and

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as he said "Sit up" the second time the team started on a run, and then *Montgomery* struck down this way (indicating), two or three blows, and said, "Sit up, God damn you, or I'll kill you," and he could not tell what part of the body he struck, but it must have been the side or shoulder; that he thought it was a man that was intoxicated; that the deceased did not sit up, but remained in the same position; that he could see and hear the blows; that his house stood about twenty-six rods back from the road, and the garden where he was standing was just west of the house. Two of the witness Barden's daughters testified to practically the same facts. James Scott, who lived on a farm three and one-third miles from Warrens, testified that he saw the defendant and his wife driving home; that the horses were running and *Montgomery* was whipping them; that Mrs. Montgomery was sitting on the right side of the buggy and leaning against the defendant. Mrs. Scott testified that she saw them, and that the team was running; that the deceased seemed to be reclining on the back of the buggy; that she had no hat on; and that her hair was hanging down the back of the neck. Pearl Green, a daughter of Cecil Green, who lived about five miles east of Warrens, testified that she saw the defendant on the road about eighty rods east of her house; that the defendant was on the south side of the buggy, and seemed to be picking up something kind of heavy; that she saw him get into the buggy, and saw him go past her place; that the horses were on a run; that there was a woman with him, who was sitting on the left side. T. G. West testified that he saw the parties at the same place, and that *Montgomery* was on the right side of the buggy and a woman on the other side; that they were driving at a pretty good gait; that the woman was leaning toward the defendant with her head well down and her hair disheveled, so that he could not recognize her. There was also evidence of other witnesses that the horses were on the run as they passed Green's. There was also testimony to a number of statements

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made by *Mr. Montgomery,* to the effect that the deceased pitched out of the buggy and was run over. The defendant testified that he was not angry at any time between Warrens and the time he reached home that night—he was perfectly cool.

The defendant requested the court to give the jury the definitions of manslaughter in the fourth degree as stated in sec. 4362, Stats. 1898, and the definition of manslaughter in the second degree as stated in sec. 4350, Stats. 1898, and to instruct the jury that they might find the defendant guilty of either of these degrees of manslaughter. The court refused to give these instructions. Further statement of the facts of the case, necessary to an understanding of the points decided, will be found in the opinion.

A. H. Smith, attorney, and *F. J. Smith,* of counsel, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and by *Howard Teasdale,* of counsel, and oral argument by *Mr. Titus.*

WINSLOW, J. The questions raised which we deem it necessary to decide will be considered in their natural order.

1. Upon the motion for change of venue there were filed a large number of affidavits tending to show that there was much popular excitement in a considerable part of Monroe county immediately following the death of Mrs. Montgomery, and much adverse feeling against the defendant; on the other hand, there was a much larger number of affidavits from many men of standing in various parts of the county to the effect that there was no popular prejudice against the defendant, and that he could receive a fair trial. The question was one of fact for the trial court, and we cannot say from the record that it was wrongly decided.

2. The defendant filed a special plea in bar on the ground

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of former jeopardy. By this plea it appeared that the defendant was arrested on June 1, 1903, upon a complaint and warrant charging assault, and taken before a justice of the peace, where he pleaded not guilty, and the case was adjourned; that he appeared on the adjourned day and demanded trial, whereupon the district attorney *nolled* the case and the action was dismissed and the defendant discharged. A demurrer to this plea was sustained, and we think rightly. Conceding that a prosecution and acquittal of assault would bar a prosecution for murder (which is not decided), the accused must actually be put on trial—that is, the trial must have commenced—before he can be said to have been in jeopardy. Such was not the case here. *McDonald v. State,* 79 Wis. 651, 48 N. W. 863.

3. After the plea in bar had been overruled, a plea in abatement on the ground that the defendant had not had a legal preliminary examination was filed, and a demurrer to the plea was sustained. The plea showed, in brief, that the defendant was arrested on the 10th of June, 1903, upon a complaint and warrant charging murder in the first degree; that he pleaded "not guilty," and an adjournment was taken; that on the adjourned day an examination was held and an inquest taken, and the justice found that there was probable cause to believe the defendant guilty of murder, and ordered the proceedings to be stopped and the defendant sent to jail to appear before the circuit court to answer thereto, and issued a commitment under which the defendant was committed to the common jail of Monroe county. This was entirely sufficient, under the decisions of this court in *State v. Leicham,* 41 Wis. 565, and *Campbell v. State,* 111 Wis. 152, 86 N. W. 855.

4. The defendant requested the giving of the following instruction, which was refused:

"I charge you, gentlemen, that it is a prominent fact in this case that the deceased is the wife of the defendant. The

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presumption that has arisen that she was not killed by her husband or that it was not malice aforethought is powerful. The relation of the husband and wife clearly implies a strong partiality on the part of the husband towards his wife and the most ardent desire to protect her and render her happy. As a man will conserve his own preservation and pursue his own interests, so, as a general truth, he will equally regard the protection and interest of his wife."

This was properly refused. While the sentences requested were quoted approvingly by this court from a Connecticut case, in *Boyle v. State,* 61 Wis. 440, 21 N. W. 289, they were simply used as an argument upon the question of admission of certain evidence, not as an appropriate charge to a jury. It would clearly not have been proper under the testimony in the present case to have given the jury any such broad and sweeping generalizations as to the presumptions resulting from the marital relation.

5. The defendant's counsel made the following request for an instruction to the jury:

"The defendant requests that the court instruct the jury upon the law and definition of manslaughter in the second degree, as stated in sec. 4350 of the Statutes of the State of Wisconsin, and instruct the jury that if they find from the evidence that manslaughter in the second degree is proven they can find the defendant guilty of such charge."

A similar charge was requested as to the fourth degree of manslaughter, under sec. 4362, Stats. 1898. Both of these requests were refused, and exceptions were duly taken, and these rulings are now assigned as error. The effect of the general charge of the court was that the defendant must either be convicted of murder in the first degree or acquitted. The instructions requested were inartificially drawn and cannot be commended. A requested instruction should be so drawn that it can be given in the words of the request without change. Stats. 1898, sec. 2853. In prosecutions for serious crimes, however, this court has held that requested instruc-

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tions which express a correct principle should not be refused on account of a mere verbal inaccuracy, but that the trial court should correct the inaccuracy and give the instruction. *State v. Wilner,* 40 Wis. 304; *Conners v. State,* 47 Wis. 523, 2 N. W. 1143. In substance, the defendant requested the court in writing to read to the jury the sections of the statute named, and instruct them that if the facts warranted they could find the defendant guilty of either of such offenses. So we think we must meet the question whether there was evidence in the case which would require the court, if requested, to submit the question of manslaughter in the second degree, or manslaughter in the fourth degree, or both, to the jury.

Manslaughter in the second degree is thus defined by sec. 4350:

"The killing of a human being, without design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree."

Manslaughter in the fourth degree is thus defined by sec. 4362:

"The involuntary killing of another by any weapon or by any means, neither cruel nor unusual, in the heat of passion, in any cases other than such as are herein declared to be justifiable or excusable homicides, shall be deemed manslaughter in the fourth degree."

It will be noticed that in both of these offenses the killing must be done in the heat of passion, and we are first met by the proposition on the part of the state that, because the defendant testified positively that he was not angry at any time during the ride home, he is concluded upon the subject, and was not entitled to ask for an instruction that he might be found guilty of any crime involving as a necessary element the heat of passion. On this point reliance is placed upon the decision in the case of *Perugi v. State,* 104 Wis. 230, 235, 80 N. W. 593, and it must be said, in justice to the trial

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court, that the ruling is fully sustained by the decision upon the exact point which was made in that case. It was suggested also that a like ruling was sustained in *Fertig v. State,* 100 Wis. 301, 75 N. W. 960, but reference to that case shows that, in passing upon the propriety of a proposed instruction involving self-defense, the fact that defendant had testified and maintained that his act was accidental was mentioned, but was simply relied on as a part of the proof which, in connection with other evidence, demonstrated that there was no ground on which a finding of self-defense could be based. However, the ruling was unmistakable in the *Perugi Case,* although no authorities were cited in its support nor have we been able to find any. Upon mature consideration we are satisfied that the ruling cannot be justified. It is well established that while a party in either a civil or criminal case may not directly impeach his own witness, he may show that his testimony is not correct by other witnesses, who testify to a different state of facts. *Richards v. State,* 82 Wis. 172, 51 N. W. 652; *Collins v. Hoehle,* 99 Wis. 639, 75 N. W. 416. It has also been held in Massachusetts that there is no sound reason why this rule should not, if the circumstances are consistent with honesty and good faith, be applied when the party himself is the witness, nor why, under the same circumstances, he may not rely on the testimony of the witnesses of the adverse party to prove material facts denied by his own testimony. *Hill v. West End St. R. Co.* 158 Mass. 458, 33 N. E. 582. Thus, in the present case, suppose there had been a third person in the buggy, who testified to facts showing that the defendant was in anger, and in the course of a struggle with his wife she fell or was thrown from the buggy and received her injuries, could not the defendant have relied on this testimony and insisted upon its submission to the jury, whether the witness were called by himself or by the state, and notwithstanding the fact that he had testified that he was not angry? His testimony that he was not angry is not nec-

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essarily dishonest, although it may not be true. He had testified to facts well calculated to excite passion on his part, and we all know how prone people are to honestly misjudge their own feelings, to affirm in good faith that they are not excited or angry, when it is apparent to others that they are. There was direct testimony on the part of the state showing a high state of anger on the part of the defendant upon this remarkable ride; if the jury had found the defendant guilty of a degree of homicide necessarily involving heat of passion, could the defendant have demanded and obtained a new trial because he himself had denied anger? These considerations seem to us conclusive to the effect that the ruling in the *Perugi Case* was wrong and must be overruled, and that, as a result thereof, the defendant was entitled in the present case to have the question of his guilt of either the second or fourth degree of manslaughter submitted to the jury.

6. We reach now the contention that the evidence adduced did not justify a verdict of premeditated murder. We have given this subject careful and earnest consideration. The circumstances under which this woman met her death were of a most remarkable character. She and her husband left Warrens for home near the close of an apparently happy day, in reasonably good health and spirits. There was no indication of any impending disaster or threatened violence. They were in an open buggy, in broad daylight, driving over a familiar road, lined with the homes of friends and neighbors who knew them well, returning home after a separation of weeks or months. Before they had gone two miles the wife had been out of the buggy, her hair was disheveled and streaming down her back, her face covered with blood. From this point the defendant whipped his horses and drove at great speed for most of the way, and the woman was apparently leaning against her husband. She was out of the buggy again when near the end of the journey, and when she reached the end she was either dead or dying from dislocation

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of the first and second vertebræ of the neck, her face and head terribly bruised and cut, and her body bearing the marks of her terrible experiences. The defendant telephoned at once for a doctor, over a line which ran through the houses of all his neighbors, and also called some of the neighbors by telephone. The injury was one which produces instant paralysis or death, or both, almost invariably. It generally results from a fall on the head, but may be produced by a sufficient blow upon the neck. There was no testimony of any threat, save the somewhat remarkable testimony of the Bardens to the effect that the defendant, at about three miles from Warrens, struck her on the side or shoulder and said, "Sit up, God damn you, or I'll kill you." It cannot be supposed for a moment that these blows resulted in the fracture of the vertebræ, for the position in which the parties were sitting—*i. e.* side by side in the buggy—renders it hardly possible that a blow upon the neck sufficient for such a result could be delivered. If the defendant killed his wife by design he certainly chose a most unlikely means, a most unlikely time and place, and followed his act with most remarkable conduct. He was not an educated man. He could not have known that a blow on the neck would be likely to cause such results, nor that a fall from the buggy would be likely to produce them. Not knowing that such results would be probable, is it reasonable to conclude that he adopted either of these means from premeditated design to murder? Can it be reasonably supposed that a man who intended to murder his wife would throw her from the buggy on the chance that she might fall on her head and break her neck, and then gather her into the buggy and run his horses home in view of all his neighbors, and call in a doctor and his neighbors to view his work? We confess that we have been much troubled in attempting to solve these questions, but we have been forced to the conclusion that, culpable as the conduct of the defendant toward his wife may have been, the evidence adduced does not justify

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the jury in finding, beyond a reasonable doubt, that murder was in his heart. In our judgment, justice has miscarried here, and there must be a new trial upon this ground as well as for the errors before noted.

By the Court.—Judgment reversed, and action remanded for a new trial. The warden of the state prison is directed to deliver the plaintiff in error into the custody of the sheriff of Monroe county, to be by him held to abide the further order and judgment of the court.

CASSODAY, C. J., took no part.

THE STATE VS. MURPHY.

March 28—April 17, 1906.

Immunity from prosecution: Person testifying before grand jury: Extent: Privilege of witness: Separate trial on issue of immunity: Questions certified to supreme court: Form.

1. Under sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901 (providing that in certain proceedings no person shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, etc., but that no person shall be prosecuted "for or on account of any transaction, matter, or thing concerning which he may testify"), the immunity from prosecution is not broader than the constitutional privilege of the witness (Const., art. I, sec. 8) as to self-crimination.
2. One who was subpœnaed, sworn, and examined before the grand jury, answering only the questions asked, but making no objection to them, is entitled to such immunity as the statute confers, as to transactions concerning which he so testified.

WINSLOW, J., dissents, being of the opinion that, in order to gain the immunity, the witness must be *compelled* to testify, and that compelling a person to appear by subpœna cannot properly be considered as compelling him to testify.

MARSHALL and KERWIN, JJ., are of the opinion that the immunity is given only where the witness testifies under real com-

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pulsion, not mere right of compulsion; that is, there must be coercion to the extent of the witness being called to testify under such circumstances that he would be liable to punishment as standing in defiance of the court if he refused to do so.

3. It is not necessary, in order that there may be immunity from prosecution, that the witness should have given evidence adverse to himself, or that he should have told the truth.
4. An alderman, giving evidence before the grand jury, answered in the negative the question whether he had received any money for his vote on special privileges, bay windows, sidetracks, etc. *Held*, that he did not thereby testify concerning the transaction, matter, or thing for or on account of which he was afterwards prosecuted upon an information charging that he had solicited and received a certain sum to induce him to vote in favor of an ordinance allowing certain persons to lay a sidetrack across certain streets.
5. The question whether a special plea of immunity should be tried separately or in conjunction with the plea of not guilty was not a proper one, in that abstract form, to be certified to the supreme court under sec. 4721, Stats. 1898, but is treated as being in effect a question whether error was committed in the particular case by such separate trial.
6. Where defendant requested a separate trial of the issue on the plea of immunity, and the information fully set out the matter on account of which he was attempted to be prosecuted, such separate trial was not error.

REPORTED from the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge.

On February 1, 1904, an information was filed against the defendant charging that on the 17th day of June, 1899, he, then being an alderman of the city of Milwaukee, Wisconsin, solicited and received from Oscar F. Davis $80 for the purpose of inducing accused to vote in favor of a then pending ordinance allowing said Davis's firm to lay a sidetrack across certain streets in said city of Milwaukee. After reversal of the first conviction (124 Wis. 635, 102 N. W. 1087) the action was again brought to trial, the defendant having interposed both a plea of not guilty and a plea in bar for that, before a grand jury sitting on the 9th day of January, 1902,

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charged with the duty of investigating such offenses, defendant attended and gave testimony as to the transactions, matters, and things alleged in the information, by reason whereof the defendant claimed he could not be prosecuted or subjected to any penalty or forfeiture therefor. The case being reached for trial, defendant's attorneys called attention to the plea in bar, and stated that was the first thing to be heard and tried, to be followed, if necessary, by the plea of not guilty, to which the court responded, "that will be the order of procedure." Accordingly, jury being impaneled, trial on the special plea proceeded, where was proved the instructions to the grand jury to consider all malfeasance in office on the part of city and county officers with a reference to the statutes against bribery; also offer of proof that defendant was subpœnaed to attend on the 9th day of January, 1902, and did so. They then called the clerk of the grand jury and produced his minutes, showing that defendant was produced as a witness, sworn, and was asked and answered questions. The minutes of testimony read thus: "Ald. *Wm. Murphy,* alderman Third ward, serving second term, sworn: Know Fred Schultz, J. M. Clarke, Mr. Walker. Know of no alderman or public official demanding or receiving money to support any contract, special privilege, or franchise. Never had conversation with Schultz, or any other newspaper man, about special privilege for electric signs." Witness stated: "That does not purport to give the questions asked *Mr. Murphy;* only a synopsis of the answers."

Thereupon defendant testified that he was subpœnaed, sworn, and examined by the district attorney, and was asked "if I received any money for my vote on special privileges, bay windows, sidetracks, electric light, street railway extensions, I, or any of the aldermen or city officials," and that he answered such questions. Also that the district attorney "asked me if I got any money for sidetrack privileges or if I knew any alderman or any city official that had received

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money for their influence, their vote—I answered him." "I answered these questions under oath . . . I answered fully all questions asked me while a witness before the grand jury." The ordinance granting Davis Bros. a right to lay a sidetrack was introduced and passed before the examination before the grand jury. On cross-examination he stated that he had no recollection of being cautioned that he need not give evidence which, in his opinion, would criminate him, but he could not swear positively; that he gave his testimony voluntarily and offered no objections to the questions asked him, and that the minutes kept by Mr. Moravitz are not a full report of the testimony he gave; that he did not volunteer any evidence, only answered what he was asked, and gave his testimony because he was subpœnaed to go before them and was asked questions by the prosecuting attorney, but freely and voluntarily.

Mr. Goff, assistant district attorney, stated that the witnesses (before the grand jury) were instructed that they need not incriminate themselves; also that the attention of the district attorney had not been called to ch. 85, Laws of 1901.

Thereupon, on motion of the district attorney, the court directed the jury to find a verdict in favor of the state, which they accordingly did, and to which action defendant duly excepted. Then the trial upon the plea of not guilty proceeded and defendant was convicted of the charge set forth in the information. Thereupon the court, deeming that certain questions were doubtful and important, certified the following for answer, viz.:

"(1) Was the evidence, all of which is herewith certified, sufficient to immune the defendant under the provisions of sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901?[1]

[1] Sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901, is as follows:

"No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received by or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the

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"(2) Did the court err in directing a verdict against the defendant and in favor of the state on the special plea in bar herein, under the evidence?

"(3) Should the plea of immunity be tried separately, or in conjunction with the plea of not guilty?"

For the plaintiff there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and by *Francis E. McGovern,* district attorney, and *Guy D. Goff,* assistant district attorney, of counsel, and oral argument by *Mr. McGovern.*

J. M. Clarke, for the defendant.

DODGE, J. In presenting the first question certified, counsel have discussed many general considerations bearing upon the purpose and scope of this immunity statute which, in its exact form and words, originated with Congress in Act February 11, 1893, ch. 83, 27 Stats. at Large, 443 [3 U. S. Comp. Stats. 1901, p. 3173]. The counsel for the state insists that its only purpose is to enable the obtaining of evidence which by the fourth and fifth amendments to the constitution of the United States a witness is privileged to withhold but for such a statute, hence that it must be construed as intending to grant immunity only broad enough to accomplish that result; only such as must be granted in order to evade the constitutional privilege of silence as to self-criminatory facts. But must we assume that the statutory immunity is no broader than the constitutional privilege of a witness to withhold evidence which may be used against him in a criminal case? The legislature, of course, might refrain from invading private liberty up to the full limit that the constitution permits, just

state or any municipality, involving the official conduct of any officer thereof, shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony."—REP.

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as individuals may, and some do, refrain from disturbing their neighbors' comfort up to the full limit permitted by law. If the words of the act in question, reasonably considered, do fairly promise a broader immunity than could have been secured had the constitutional privilege of silence been exercised, why should they not be given effect. No court can presume that the legislature acted in bad faith or with intent to mislead or deceive. *Great Falls Mfg. Co. v. Att'y Gen.* 124 U. S. 581, 599, 8 Sup. Ct. 631. Hence any promise such as this is to be at least fairly construed in favor of one who in consideration thereof is deprived of a valuable right. Is there anything in the history of this legislation so clearly limiting the legislative intent that it should control the words used to express it?

In an effort to reach certain crimes which involved complicity of two or more persons and, ordinarily, could not be proved without the testimony of some of those concerned, Congress had enacted that no such testimony "shall be given in evidence, or in any manner used against such party or witness," etc. Notwithstanding this statute, Counselman, a grain dealer, refused to answer to a grand jury whether he had obtained any rebates or cut rates from railroads, also whether he knew of any such favor being allowed any shipper in Chicago. The supreme court of the United States sustained him in such refusal by unanimous decision, where was considered exhaustively, in the light of all prior adjudications, the true construction of the constitutional right of silence as to criminatory matters. It was held that this right is a highly favored one, the preservation of which is more important and sacred than any considerations of convenience of government in discovering or punishing crime; that it reaches not only disclosure of actual crime, but of any fact however apparently innocent in and of itself which might under any circumstances aid in supplying a link in a chain of circumstantial evidence of a crime, or even might constitute a source

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or means from which or by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction, without using his answers as direct admissions against him. *Counselman v. Hitchcock,* 142 U. S. 547, 585, 12 Sup. Ct. 195, 206; a view sustained by MARSHALL, C. J., 1 Burr's Trial, 244; *Boyd v. U. S.* 116 U. S. 616, 6 Sup. Ct. 524; *Bram v. U. S.* 168 U. S. 532, 18 Sup. Ct. 183; *People ex rel. Taylor v. Forbes,* 143 N. Y. 219, 38 N. E. 303; *Emery's Case,* 107 Mass. 172; *Thornton v. State,* 117 Wis. 338, 341, 93 N. W. 1107. Upon this construction of the constitution it was held that the statute then under consideration merely prohibiting the use in evidence in any proceeding against him of the testimony a witness might have given in other described proceedings, was not equivalent to the protection resulting to him from the constitutional privilege to remain silent, and that nothing short of complete immunity from prosecution or punishment could be so equivalent; that unless the statute made it impossible that there should be a "criminal case" against him which might be aided in the way described by some answer to the questions propounded he still might refuse to answer.

This case has since been followed in nearly all the states where either the construction of a similar constitutional guaranty or an immunity statute has been considered, although in some of them a different view had previously been declared; notably in New York, where the court of appeals has expressly overruled *People ex rel. Hackley v. Kelly,* 24 N. Y. 74, which was considered the leading adverse case by the supreme court of the United States. *People ex rel. Lewisohn v. O'Brien,* 176 N. Y. 253, 68 N. E. 353. In the *Counselman Case* the court not only decided the inability of Congress to infringe upon this right of silence and the broad and liberal construction which must be accorded the constitutional guaranty, but by original statement and apt quotation dwelt on the sacredness of that right and the tyran-

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nical and despotic character of attempts by government to outrage the privacy of the individual, in emphasis of the impropriety and inconsistency of any, even the first and most insidious, step in that direction by a government created by the people for the primary purpose of assuring and protecting individual liberty.

To this admonition from the court Congress responded by enacting, in modification of the former attempted legislation, the statute of 1893, which, as far as material, provided:

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents [in certain proceedings] on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission. . . . Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." Act Feb. 11, 1893, ch. 83, 27 Stats. at Large, 443 [3 U. S. Comp. Stats. 1901, p. 3173].

It will be noticed at once that this statute is replete, almost to tautology, with broadening repetitions and synonyms, which strongly suggest an effort to assure as broad a field of immunity as words could well express, and the query is at once suggested whether such evident industry of expression is not significant of an intent not alone to satisfy the exact restrictions imposed by the constitution, but to defer broadly to the governmental duty of protecting amply and generously the individual right of privacy, the sacredness of which had been so impressively stated in the *Counselman Case*. Especially are such expressions significant when we remember that much more limited ones have been held to satisfy the prohibition contained in the constitution. Thus, in New Hampshire, it

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has been held sufficient to that end to declare immunity from any crime which a witness's testimony "disclosed" (*State v. Nowell,* 58 N. H. 314); and in California and Tennessee to immune a witness from an "offense as to which he testifies" (*Ex parte Cohen,* 104 Cal. 524, 38 Pac. 364; *People v. Sternberg,* 111 Cal. 3, 43 Pac. 198; *Hirsch v. State,* 8 Baxt. 89). Can it be doubted that Congress meant something broader than "offense" or "crime" by the expression "any transaction, matter or thing," or that they meant something more than "disclosed" by "concerning which he testifies"? In *Brown v. Walker,* 70 Fed. 46, 49, the act of 1893 was first held valid, and the court there declared that "In practical effect the legislative act throws a greater safeguard around the petitioner than the constitutional provision." This decision was affirmed by the supreme court in *Brown v. Walker,* 161 U. S. 591, 16 Sup. Ct. 644, where it was held that the constitution did not pretend to excuse one from disclosing facts tending merely to disgrace him. The only other review of this statute in that court is *Hale v. Henkel,* 201 U. S. 43, 26 Sup. Ct. 370, holding that the constitution does not privilege a witness to refuse to answer a question of which the answer cannot tend to criminate him personally, although it may tend to criminate a corporation of which he is an officer. In the *Packers' Case* (*U. S. v. Armour & Co.* U. S. Dist. Ct. N. D. Ill., March 21, 1906), 142 Fed. 808, 822, the court expressed its views upon the relative scope of the constitutional privilege and the statutory immunity thus:

"Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment [testimony] and the evidence need not be self-incriminating. The privilege must be

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personally claimed by the witness at the time. The immunity flows to the witness by action of law and without any claim on his part."

We do not adopt in full either the views of Judge HUMPHREY, or the expression of them, as to the construction of this statute in detail, but quote them merely as evincing his opinion that no predetermined purpose is to be presumed that the immunity granted shall be strictly confined to that guaranteed by the constitution if a broader intent is shown by the words used when they come to be construed.

Another consideration which might well have had weight in framing such legislation was the removal of all inconvenient disputes and uncertainties as to the scope of inquiry to which the witness might be subjected in the effort to learn facts upon which others might be charged, so that he might not obstruct the examination by objecting to disclosure of apparently remote and immaterial matters by raising the possibility that his answers might be criminatory as to some matter unknown to the tribunal so that, therefore, it might be unable to overrule his objection. In view of the great difficulty of discovering and punishing any one for these crimes it was at least possible to have been thought best to make the immunity so broad and attractive as to enhance the probability that one would be tempted to disclose the guilt of his associates; it being deemed wise policy to establish even a probability of punishment of some in place of the existing almost certain inability to vindicate such criminal statutes at all. For these reasons we do not find any necessary or irresistible presumption that there could have been no legislative intent to provide any immunity which would not have resulted from according accused merely the privilege of silence guaranteed him by the constitution, but must presume that the words of the statute mean what they say, construed, like all other statutes where there is any ambiguity, in the light of the surrounding circumstances and general purpose so far

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as known. Our statute (ch. 85, Laws of 1901) is obviously an adoption of the federal act, except as the field of suspension from constitutional protection is broadened somewhat.

It is upon this presumption in favor of a strictly limited intent in this legislation that counsel for the state bases a contention that unless a witness resists answering a question, at least to the extent of asserting that the answer may tend to criminate him and that he claims his constitutional privilege to refuse answer, no immunity from prosecution is earned by him. To this position there are two answers: first, that the statute in terms imposes no such limitation upon the immunity, for it assures it to any person who "may testify," not who may be compelled to testify or who may testify after first refusing or protesting and asserting his constitutional right. Doubtless no criminal can immune himself by volunteering evidence without lawful demand. But a more obvious answer is that the law, giving the prosecuting officers and the investigating tribunal the power and right to demand the answer; the subpœna commanding attendance; the administering the oath, and the putting the question, deprive the witness of any privilege to withhold the information, or to effectively protest, and notify him that the tribunal absolutely demands the testimony. A declaration that he would like to assert that privilege if he had it, when by the very proceeding he is warned that he has it not, would be so entirely futile as to be puerile. What sense in his asking whether the information is insisted on when all the steps taken constitute most unambiguous insistence? Why assert a privilege when he has none? That he has none is certain, if this statute be given effect according to its terms, for it precludes the possibility of any "criminal case" in which his testimony can be "against" him in the sense forbidden by the fifth amendment to the federal constitution and, in identical words, by sec. 8, art. I, Const. Wis. *Brown v. Walker,* 161 U. S. 591, 16 Sup. Ct. 644; *Hale v. Henkel,* 201 U. S. 43,

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26 Sup. Ct. 370. This view was taken in the only case in the United States courts yet decided, where the question has been considered. *Packers' Case* (U. S. Dist. Ct. N. D. Ill., decided March 21, 1906), 142 Fed. 808. Subpœna, oath, and question have in many cases been held to prevent any inference of voluntariness of testimony from one who does not know his right to refuse. Why not equally so if from one who has no such right? *People v. Mondon,* 103 N. Y. 211, 8 N. E. 496; *State v. Young,* 119 Mo. 495, 24 S. W. 1038; *State v. Clifford,* 86 Iowa, 550, 53 N. W. 299; *Bram v. U. S.* 168 U. S. 532, 18 Sup. Ct. 183. Needlessness of protest in presence of a demand from one having authority and power to enforce it has often been declared. *U. S. v. Lawson,* 101 U. S. 164; *U. S. v. Ellsworth,* 101 U. S. 170; *Swift Co. v. U. S.* 111 U. S. 22, 4 Sup. Ct. 244; *Mosby v. U. S.* 133 U. S. 273, 10 Sup. Ct. 327. We are satisfied that the circumstances under which defendant was called on to give his testimony were such as to entitle him to invoke such immunity from prosecution and punishment as the statute confers, and need not discuss the question whether one can by his own initiative and volition, without demand by any authorized person or tribunal, seek shelter under this law.

Another position founded on the same premise is that, because the constitutional privilege is to refrain merely from giving evidence against himself, a witness is immune from prosecution only when he gives evidence which is adverse to him. The difficulty with this position is, again, that the statute makes no such limitation; it in terms confers immunity when he testifies at all concerning a transaction, matter, or thing for or on account of which prosecution may be attempted. Indeed, if limited as counsel contends, the immunity would not be as broad as the constitutional privilege, for the latter is to refuse to answer a question at all if any answer the witness might give to such question might tend to criminate him. That is by no means satisfied by immunity

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only when the answer given does tend to charge him with the particular crime to which he pleads it.

Another suggestion is made to the effect that, unless the witness tells the truth, he cannot be said to testify concerning that of which he speaks. This would involve a highly technical and unusual meaning for the word "testify," which ordinarily means the making of any statement under oath in a judicial proceeding. 8 Words & Phrases, 6932, 6933. The statute itself, however, refutes any such meaning, for it expressly reserves the right to prosecute for perjury "in giving such testimony," thus recognizing that the word "testimony" is used in a sense broad enough to include statements which are false.

Whatever general rules of construction should apply to this statute, whenever immunity is claimed under it the question arises whether defendant did, in any reasonable sense, testify concerning the transaction, matter, or thing for or concerning which he is prosecuted. The strongest evidence is defendant's own testimony that he was asked "if I received any money for my vote on special privileges, bay windows, sidetracks, electric light, street railway extensions—I, or any of the aldermen or city officials." This he answered in the negative. The charge in the information is that he did, on June 17, 1899, ask, solicit, demand, and receive from one Davis $80 in money for the purpose of influencing the action of the common council and of himself to grant, and vote in favor of granting, privilege to lay railroad track over and across a certain public street. Did he testify concerning that transaction, matter, or thing? The very statement of the situation seems to suggest a negative answer. While the denial that a specified interview or transaction took place, or that in a known and defined interview an act was or was not done, may, and perhaps must, be deemed testifying with reference to that transaction, a mere negative answer to a broad and general question as to the existence of any transactions of a

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certain kind, in a proceeding for discovery, without hint or suggestion that the inquirer has in mind any particular occasion, is no more than a declaration by the witness that he cannot testify concerning any transaction in such category. If, in fact, any such event occurred to the knowledge and memory of the witness, his negative answer is a most effective method of refusing to testify concerning it; more effective than invoking his constitutional privilege of silence, for, in that case, the court might compel him to answer if convinced that in no contingency could any answer tend to criminate him. The situation is not in analogy with that presented under sec. 4069, Stats. 1898, prohibiting a party from testifying in respect to any transaction with a deceased person, for there the negation of any interview may suffice to lift the burden of proof resting on the living party which his opponent is unable to meet in any way. *Brader v. Brader,* 110 Wis. 423, 428, 85 N. W. 681; *Howell v. Van Siclen,* 6 Hun, 115, affirmed 70 N. Y. 595; *Haughey v. Wright,* 12 Hun, 179; *Maverick v. Marvel,* 90 N. Y. 656; *Van Sandt v. Cramer,* 60 Iowa, 424, 15 N. W. 259; *Ridler v. Ridler,* 93 Iowa, 347, 351, 61 N. W. 994. But even there parties have been permitted to deny generally facts alleged by others to have occurred at some such transaction without being deemed to testify in respect to any transaction. *In re Estate of Edwards,* 58 Iowa, 431, 10 N. W. 793; *Pettit v. Geesler,* 58 How. Pr. 195; *McMillan v. Stern,* 28 N. Y. Supp. 596; *Pinney v. Orth,* 88 N. Y. 447; *Lewis v. Merritt,* 98 N. Y. 206; *Funson v. Salisbury,* 15 App. Div. 214, 44 N. Y. Supp. 205. Indeed, in some cases direct testimony that an interview either did take place or that it did not has been held not testifying concerning the transaction. *Hier v. Grant,* 47 N. Y. 278; *Richards v. Munro,* 30 S. C. 284, 289, 9 S. E. 108; *Griffin v. Earle,* 34 S. C. 246, 253, 13 S. E. 473; *Trimmier v. Thomson,* 41 S. C. 125, 19 S. E. 291; *Andrews v. Hunt,* 7 Mackey, 311, 315. These are, however, against the clear weight of authority and

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reason, except as some of them may be harmonized on the ground that the mere fact of the interview may be immaterial and the admission of the testimony, therefore, nonprejudicial as explained in *Maverick v. Marvel,* 90 N. Y. 656.

When that answer "No" was given, the progress of investigation to discover from this witness anything concerning the transaction now charged was checked at the very threshold, unless, indeed, the grand jury had some other information of it, so as to enable specific inquiry of the witness. We are persuaded that we should but travesty the statute should we hold that a declaration that he could give no evidence of any transactions within a general class constituted testimony concerning one. That such testimony, if wilfully false, may subject a witness to a charge of perjury, has no application to the subject. The statute does not grant general immunity merely because one gives testimony which may result in a charge of perjury, but only immunity from prosecution for or on account of some transaction, matter, or thing concerning which he testifies.

This view is even more obvious with reference to the question and answer whether money was paid to any other alderman or city officer. There is nothing proved to indicate that the district attorney had any particular instance in mind or that defendant supposed he had. When, therefore, defendant answered the question "No," he in effect refused to testify concerning any transaction, if he knew of any. The whole situation and attitude is in negation of the idea that he did testify concerning one, in any reasonable sense of the statute.

For the reasons stated we are satisfied that there was absolutely no evidence that defendant did, before the grand jury, testify or produce any evidence of or concerning any transaction, matter, or thing for which he is prosecuted in this case; hence that the evidence was not sufficient to immune him, and the first question certified must be answered in the negative.

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The second question certified must be answered in the negative also. From what we have already said, our conclusion is that as matter of law there was no evidence to establish the plea of immunity from prosecution, in which case it is proper for the trial court upon the separate trial of such plea in bar to direct a verdict against it. *Murphy v. State,* 124 Wis. 635, 102 N. W. 1087.

The third question is not in proper form for certification to this court under sec. 4721, Stats. 1898, which, as already decided, authorizes only the submission of questions which have actually arisen on the trial of the cause and not abstract ones which may arise in the future. *State v. Hickok,* 90 Wis. 161, 62 N. W. 934. The case having been tried, and verdict both upon the plea in bar and upon the general plea of not guilty having been rendered, there can be no material question except whether the procedure in fact taken with reference to the trial of the special plea was so erroneous that judgment should not follow the verdict. We think, however, that we may treat the question framed by the court below as in effect a report of his need to be advised upon that which is really before him, and, so considering it, we think that no error was committed in the present case: First, because the defendant requested a separation of the issues and a preliminary trial of that upon the plea in bar; and, secondly, because no prejudice could result to him in this case, since the information fully and adequately set out the transaction, matter, and thing for or on account of which he was attempted to be prosecuted. Doubtless there may be cases where such a plea of immunity in bar cannot be intelligently tried until the evidence for the state is presented fully disclosing the transaction and the facts upon which guilt is charged, and where, therefore, a preliminary trial of such issue might be impracticable and prejudicial to the accused.

By the Court.—We answer the first question: No. We answer the second question: No. We answer the third question: No error was committed in that respect in this case.

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MARSHALL, J.[1] I concur in the answers to the questions certified for decision, but dissent, most emphatically, from the general exposition of the immunity statute which precedes the treatment of the particular points involved.

In view of the fact that in recent years there has been apparently great need for a vigorous prosecution and certain punishment of offenders and a significant awakening of appreciation in that regard, we must assume that the legislature had no other purpose in passing the immunity statute than to give aid in that respect. In that light, the law, as construed in the opinion by my brother DODGE, seems to be a most absurd enactment. If the legislature had devoted the most careful study to the subject of how best to furnish offenders an easy method of escaping the consequences of their wrongdoing: of practically, in great measure, paralyzing the administration of justice in criminal matters, it could hardly have been more successful, if the intent embodied in the immunity law is as suggested in the opinion on file.

I had no idea, when the opinion was handed down, that it contained what would be considered by trial courts, as it seems will be the case, a most emphatic approval of the very extreme view, I venture to say, expressed by Judge HUMPHREY in the *Packers' Case,* 142 Fed. 808, and indicated in the quotation from his opinion of the federal immunity statute on which ours was modeled. I did not appreciate that the court was committed to the idea that such statute was intended to, and in fact does, go very much farther than the constitutional guaranty against compulsory self-crimination; that its purpose was to go so far beyond the scope thereof as

[1] Note by MARSHALL, J. In order that this and the other independent opinions in this case may be understandingly read it seems best to say this: The paragraph in the main opinion commencing with "We do not adopt," etc. (*ante*, p. 210), which immediately follows the quotation from the *Packers' Case*, was added to such main opinion after the independent opinions were filed, so as to remove from such main opinion any indication contained therein of indorsement by the court of the quoted doctrine.

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to not only secure the evidence which the privilege of silence would otherwise obscure, but, by affording the offender a sort of *gratuity,* obtain disclosures which, but for moral turpitude, he could be compelled to make any way: disclosures of mere circumstances so remote as not to fall within the scope of self-incriminatory evidence. Nothing could have been further from my thoughts than that the legislative purpose was to make the inducement to testify "attractive" by holding out a substitute for the constitutional privilege, and a bribe, so to speak, as to matters beyond its scope as well. I wish, as emphatically as practicable, to express my dissent from any such extreme view. I had supposed that, with nearly a unanimous voice, it was condemned when the case was decided preparatory to writing the opinion. My brother DODGE, however, had a right to suppose that his treatment of the matter was acquiesced in, at least, since no one objected when the opinion was read. I do not intend by anything said here to criticise my brother in the slightest respect. The fault, if there be any, is not his. For myself, I confess fault. I did not appreciate what was said in the opinion. I did not give the attention thereto that I should have done, though there is a fairly good excuse therefor, which, however, need not be stated here.

Under the circumstances I shall not attempt to discuss the immunity statute, giving reasons and authorities for the views I entertain. Some other occasion will doubtless be presented for further consideration of the matter. That I am persuaded to believe by the fact, in part, as I understand it, that there is a radical conflict between the exposition of the law, from which I dissent, and that in the case decided with it, opinion by Justice SIEBECKER, with which I concur. I shall content myself for now by a mere statement of the conclusions which I had supposed were in accordance with the idea of a majority, at least, of the members of the court participating in the decision.

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The purpose of the immunity statute was to take the place of the constitutional privilege against self-incriminatory evidence. It was designed to open the doors in just so far as such privilege would otherwise hold them closed by the right of silence. Its scope, therefore, coincides with such privilege, stopping not short of it, nor going beyond it.

The exposition of the federal statute by Justice HUMPHREY in the *Packers' Case,* quoted from by my brother DODGE, viewed as applicable to statutes of which ours is a type, I believe, goes altogether too far and will not stand the test which will be applied to it.

(1) The statute does not wipe out the offense about which the witness might have refused to answer. It creates a bar to a prosecution for the offense. The offense with its attendant moral turpitude is left just the same, but by force of the statute the public is remediless.

(2) The statute is not broader than the constitutional guaranty for which it was intended to be a "substitute." The very idea of a substitute suggests the limitation of one as that of the other. In other words, that they are equivalents, one being exchanged, by force of the law, for the other.

(3) The statute does not immune because of evidence given other than that of a self-incriminatory character; such as without the statute would be obscured by the constitutional privilege of silence.

(4) For the statute to operate there must be evidence under real compulsion, not mere right of compulsion. That is, there must be coercion to the extent of the witness being called to testify under such circumstances that he would be liable to punishment as standing in defiance of the court if he refused to do so. In that situation only does the law relieve him from the necessity of expressly claiming his privilege. Until the law then lays its hand on the party so that resistance would be a defiance of the court, the statute does not intervene.

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(5) In the term "no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence," etc., the term "transaction, matter, or thing" has reference to any of the designations: to an event of a criminal character. Each is one of a species, a synonym, in great part, for either of the others. The familiar rule *noscitur a sociis* applies. The evidence spoken of is evidence of an incriminating character, as to a transaction giving rise to a cause of action to punish for a crime, or a thing giving rise to such cause, or a matter giving rise to some such cause, in which the witness participated. It has no reference to any remote circumstance, not in itself a basis for such a cause. In other words, the law contemplates only a situation as regards an event, whether denominated a transaction, a matter, or a thing, where, under the constitutional privilege of silence, the person compulsorily called to testify might refuse to speak, but for removal of the precise danger which such privilege was designed to shield him from. So the statute becomes active whenever and wherever the constitutional privilege would otherwise operate; and its activity ceases when that would otherwise not intervene. It is a substitute, and that only.

These views are substantially in accord, as I understand the matter, with those expressed in the opinion in *Rudolph v. State* (opinion by Justice SIEBECKER), *post*, p. 222, 107 N. W. 466.

KERWIN, J. I concur in the foregoing opinion of Mr. Justice MARSHALL in so far as it expresses dissent from the view that our own immunity statute is broader than the constitutional privilege of silence as to self-incrimination; and I concur in the view that the statute operates only in cases where evidence is given under real compulsion and concerns, in some respect, an event giving rise to a criminal prosecution against the witness.

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WINSLOW, J. (*concurring*). I agree fully with the conclusions reached, but not with some of the reasoning. The immunity statute was passed to obviate the difficulty of obtaining testimony in criminal cases caused by the constitutional guaranty that no person should be compelled to be a witness against himself. This provision, as construed, means that no person should be compelled to answer questions concerning any matter when the court can see that his answers might reasonably have a tendency to convict him of crime. The immunity statute declares in substance that he shall be compelled to answer such questions, but shall never be prosecuted on account of the matter concerning which he may so testify. In my judgment the immunity statute is as broad as the privilege which it was passed to obviate, and no broader. In order to gain the immunity the witness must, in my opinion, be *compelled* to testify. He could waive his constitutional privilege by testifying voluntarily, he can likewise waive his statutory immunity by doing the same thing. I do not think that compelling a person to appear by subpœna can properly be considered as compelling him to testify. It was not so considered with regard to the constitutional guaranty. A person might be compelled by subpœna to attend, but might testify voluntarily when so in attendance, and thus waive his privilege. In like manner I think he may waive his immunity. Otherwise the statute becomes a snare to the prosecutor and a means of avoiding the just consequences of crime. I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the court. When this has been done he gains immunity from prosecution on account of the transaction or matter concerning which he testifies, and not before.

In this case, therefore, I think there was no immunity on two grounds: First, because the defendant testified volun-

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tarily before the grand jury; he was not compelled to testify. Second, because he did not give any testimony concerning the transaction or thing for which he is now being prosecuted.

CASSODAY, C. J., took no part.

RUDOLPH, Plaintiff in error, vs. THE STATE, Defendant in error.

March 29—April 17, 1906.

Attempt to commit felony: Soliciting bribe: Overt acts: Immunity from prosecution: Testimony before grand jury: Criminating facts: Privilege of witness.

1. The unsuccessful soliciting by a public officer of a bribe to influence his official action is an offense under ch. 34, Laws of 1901, providing that "any person who shall advise the commission of or attempt to commit any felony . . . that shall fail in being committed," shall be punished, etc.
2. Where, just before a committee of a city council was to pass upon a claim, a member of such committee asked the claimant for a certain sum of money as a condition of voting for allowance of the claim, and urged the claimant to pay said sum and an additional sum to other committee members, and offered to secure favorable action on the claim if such demands were granted, these were overt acts done in furtherance of a criminal design, sufficient to justify conviction of an attempt to commit a felony.
3. Testimony of an alderman before the grand jury that he knew of no bribery or crookedness in public affairs, does not entitle him (under sec. 4098, Stats. 1898, as amended by ch. 85, Laws of 1901) to immunity from prosecution for soliciting a bribe while such alderman.
4. Testimony of an alderman before the grand jury that at a certain time he was such alderman was not testimony of a criminating fact coming within the constitutional privilege as to self-crimination, and does not entitle the witness to immunity from prosecution for soliciting a bribe to influence his official action while such alderman.

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ERROR to review a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The plaintiff in error, hereinafter referred to as the defendant, was indicted, being charged with the offense of having solicited a bribe, tried before a jury in circuit court, and found guilty. The indictment charges:

"That on the 19th day of April, A. D. 1901, at said county of Milwaukee, the city of Milwaukee was a municipal corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and located in said county of Milwaukee, in the state of Wisconsin; that one *Robert L. Rudolph* then and there was a duly elected, qualified, and acting officer of said city of Milwaukee, to wit, a duly elected, qualified, and acting alderman of the Eleventh ward of said city of Milwaukee and member of the common council thereof; that a certain claim of one Charles H. Hamilton against said city of Milwaukee for the sum of sixteen hundred twenty-five ($1,625) dollars, for professional services alleged therein to have been theretofore duly rendered by said Charles H. Hamilton, as an attorney at law, for said city of Milwaukee (he, the said Charles H. Hamilton, being then and there and theretofore and during all the times when said services were alleged to have been rendered as aforesaid, a duly licensed attorney at law, duly admitted to practice as an attorney at law in all of the courts of the state of Wisconsin), was then and there duly pending before said common council of said city of Milwaukee and before the committee on judiciary thereof, which said committee was then and there a duly appointed and constituted standing committee of said common council, and of which said *Robert L. Rudolph* then and there was a duly appointed, qualified, and acting member, for the action, vote, and decision of said common council and of said committee on judiciary on the question of the allowance and payment of said claim, which said claim was then and there within the jurisdiction, power, and authority of said common council to allow and pay or to disallow the same; that the said *Robert L. Rudolph*, being then and there such alderman and member of said common council and of said committee on judiciary thereof as aforesaid, and while

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said claim of said Charles H. Hamilton against said city of Milwaukee was then and there duly pending before said common council and said committee on judiciary thereof for the action, vote, and decision thereon of said common council and of said committee on judiciary thereof, and of said *Robert L. Rudolph* as one of the members of said common council and of said committee as aforesaid, did then and there on said 19th day of April, A. D. 1901, at said county, unlawfully, feloniously, knowingly, and corruptly attempt to commit the crime of bribery, and did then and there unlawfully, feloniously, knowingly, and corruptly advise, solicit, ask, and demand of said Charles H. Hamilton that he, the said Charles H. Hamilton, then and there commit the crime of bribery by him, the said *Robert L. Rudolph,* then and there unlawfully, feloniously, knowingly, and corruptly advising, soliciting, asking, and demanding of him, the said Charles H. Hamilton, then and there that he, the said Charles H. Hamilton, then and there pay over and deliver to him, the said *Robert L. Rudolph,* the sum of one hundred ($100) dollars in money, then and there of the value of one hundred ($100) dollars, then and there to be paid to and used by him, the said *Robert L. Rudolph,* for the purpose and with intent on the part of the said *Robert L. Rudolph* then and there of unlawfully, feloniously, and corruptly influencing the action, vote, and determination of the said common council of the said city of Milwaukee, and of the members thereof, and of said committee on judiciary, and of said *Robert L. Rudolph* as a member thereof, upon the question of the allowance and payment of said claim of said Charles H. Hamilton against said city of Milwaukee then and there pending before said common council and said committee on judiciary thereof as aforesaid, and of unlawfully, feloniously, and corruptly influencing the action, determination, and vote of said *Robert L. Rudolph* as such alderman and member of said common council and member of said committee on judiciary thereof on the said question of the allowance and payment of said claim; and he, the said *Robert L. Rudolph,* then and there did promise the said Charles H. Hamilton, for and in consideration of such payment, to use his interest and influence as such alderman and member of said common council and of said committee thereof in favor of the allowance and payment of said claim of said

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Charles H. Hamilton against said city of Milwaukee, and to vote and act in a manner for the furthering and obtaining of a favorable action by said common council and of said committee on judiciary thereof, on said question then and there pending as aforesaid, to wit, the allowance and payment of said claim; that said unlawful, felonious, and corrupt advising, soliciting, asking, and demanding of him, the said Charles H. Hamilton, by him, the said *Robert L. Rudolph,* to commit the crime of bribery as aforesaid, then and there failed in being committed and was of no effect; and that the crime of bribery accordingly then and there failed in being committed, because the said Charles H. Hamilton then and there refused to comply with the said solicitation, advising, request, and demand of the said *Robert L. Rudolph.*"

The defendant demurred to the indictment, averring that it did not state facts sufficient to constitute an offense. The court overruled the demurrer, and the defendant excepted. The defendant then interposed a special plea in bar, wherein he alleged the calling of a grand jury by the municipal court of Milwaukee county to inquire into alleged commissions of crimes and charges of crimes in the county; that a grand jury was duly summoned, qualified, and sworn in the municipal court and directed to make due inquiry into all charges and commissions of crime in the county; that the defendant, on January 20, 1902, was subpœnaed to appear before this grand jury on January 21, 1902; that he obeyed such subpœna and appeared before the grand jury at the time and place as directed; was sworn as a witness in a proceeding before them and testified concerning transactions, matters, or things involving the official conduct of city aldermen during his official term as alderman of the city; and that such testimony so given by him before the grand jury was concerning the transaction, matter, or thing for which he is being prosecuted upon this indictment, and he therefore demanded judgment discharging him from further prosecution.

Upon the trial of the issue raised by the special plea in bar, it was admitted that defendant had been subpœnaed and

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examined before the grand jury. Defendant then offered in evidence the minutes of the grand jury containing the following:

"*Robert L. Rudolph* sworn. Alderman of the Eleventh ward. Knows of no bribery or crookedness in public affairs. Member of railroad committee. Does not remember who introduced Manville ordinance."

Defendant then rested as to the issue raised by the special plea in bar. The state offered no evidence as to this issue. The prosecution moved the court to direct the jury to return a verdict for the state upon the issue raised by this special plea in bar, upon the ground that there was no evidence tending to support such plea. The court so directed the jury, and a verdict was found as directed. Defendant duly excepted to the action of the court.

The trial upon the plea of not guilty was then taken up before the jury. There was evidence tending to show that defendant, while a member of the common council of the city of Milwaukee, approached one Charles H. Hamilton, an attorney who had presented a claim for legal services against the city of Milwaukee in the sum of $1,625, while the claim was pending before a committee of the common council of which he was a member, and demanded that he pay him $100 to secure the allowance of this claim by the committee and for his influence and vote as such committee member. There is also evidence that defendant and two other members of the committee had colluded to secure $100 each from this claimant for their influence and votes for the allowance of the claim, and that, while the claim was pending before this committee, defendant and another member of the committee, Cooke, each asked the claimant to pay them this sum of money, and stated that if he would pay them this sum defendant would see to it that a quorum of the committee were convened and the claim allowed. The claimant refused to

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comply with defendant's request and refused to pay the money demanded.

The case was submitted to the jury upon the evidence adduced and received and the instructions of the court. On November 18, 1905, they returned a verdict finding the defendant "guilty as charged in the indictment." The court overruled a motion for a new trial for various errors. Judgment was entered upon the verdict. Defendant prosecutes this writ of error to reverse the judgment and for a discharge from further prosecution, upon the ground that no offense is charged or established against him.

For the plaintiff in error there was a brief by *Julius E. Roehr* and *J. L. O'Connor,* and oral argument by *Mr. O'Connor.*

For the defendant in error there were briefs by the *Attorney General* and *A. C. Titus,* assistant attorney general, and by *A. C. Umbreit,* special counsel, and *Francis E. McGovern,* district attorney, and oral argument by *Mr. Umbreit.*

SIEBECKER, J. The defendant alleges that the court erred in holding that the indictment charges an offense under ch. 34, Laws of 1901, whereby it is provided that: "Any person who shall advise the commission of or attempt to commit any felony as defined in section 4637 of the Wisconsin Statutes of 1898, that shall fail in being committed, the punishment for which such advice or attempt is not otherwise prescribed in these statutes, shall be imprisoned or fined . . ." as prescribed. It is contended that the court submitted the case to the jury upon the theory that defendant was being prosecuted for the offense of an attempt to commit the crime of bribery, but that the facts alleged and shown by the evidence fall short of establishing an attempt to commit the crime of bribery, for the reason that the fact of soliciting another to join in the commission of this offense does not constitute an attempt, in

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that the alleged criminal transaction is devoid of any overt acts which are necessary to constitute an attempt to commit a crime. That solicitation to commit a crime is an offense at common law seems well supported by authorities and writers on the criminal law. Mr. Wharton, speaking of the result of the adjudications, states:

"Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice; as where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or where the corruption of a public officer or a witness is sought, or invited by the officer himself." 1 Wharton, Crim. Law (10th ed.) § 179. See, also, 1 Bishop, New Crim. Law, § 767; 1 McClain, Crim. Law, § 220; *Comm. v. Flagg,* 135 Mass. 545; *Walsh v. People,* 65 Ill. 58; *People v. Hammond,* 132 Mich. 422, 93 N. W. 1084.

The language of ch. 34, Laws of 1901, is clear in expressing the idea that to advise or attempt to commit any felony defined in the statute is an offense, punishable as prescribed. The charge preferred in the indictment comes within the definition of this statute, and constitutes an offense within its terms.

It is urged that no attempt to commit a felony is proven by the evidence adduced, because no overt act by the defendant is shown, even though a criminal intent may be manifest. There is evidence tending to show that the defendant asked Hamilton for $100 as a condition for voting for the allowance of his claim, and urged him to pay it and an additional sum to other committee members, and that he offered to have the committee convened and to secure favorable action on the claim if his demands were granted. These acts occurred just before the committee was to take action and pass upon the claim, and were in immediate connection with and the nearest steps to an actual consummation of the offense. This gives

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them the character of overt acts, done in furtherance of a criminal design. They are circumstances which show in their very nature that defendant committed them "in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime." 3 Am. & Eng. Ency. of Law (2d ed.) 250.

The defendant pleaded immunity from prosecution upon the ground that he had been subpœnaed and had appeared and given evidence before the grand jury. This claim is based on ch. 85, Laws of 1901, providing that no witness or party shall be excused from testifying in certain cases upon the ground that his disclosure might expose him to prosecution for any crime, but that he shall not be prosecuted for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence. It appears that defendant was subpœnaed, that he appeared and was sworn, and that he testified before the grand jury to the effect: that he was an alderman from the Eleventh ward of the city; that he knew of no bribery or crookedness in public affairs; that he was a member of the railroad committee; and that he did not know who introduced the Manville ordinance. In the case of *State v. Murphy, ante,* p. 201, 107 N. W. 470, this statute is construed, and it is there held that a denial by a witness that he knew of bribery in public affairs does not entitle him to immunity upon the ground that he has testified concerning any transaction, matter, or thing within the purview of the statute. The facts of the *Murphy Case* and of the instant case are, as to this question, in all respects the same, and the decision in that case rules the question here.

It is, however, claimed that, when the defendant testified before the grand jury to the fact that he was an alderman from the Eleventh ward of the city of Milwaukee, he gave testimony which came within the constitutional privilege that

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"no person . . . shall be compelled in any criminal case to be a witness against himself" (sec. 8, art. I, Const.), because this fact is material to establish the offense charged in this indictment and of which he was found guilty. In *State v. Thaden,* 43 Minn. 253, 45 N. W. 447, Justice MITCHELL, speaking for the court on this subject, says:

"All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give."

This rule is supported in this court in *Kirschner v. State,* 9 Wis. 140; *Emery v. State,* 101 Wis. 627, 78 N. W. 145; and in other courts in *Calhoun v. Thompson,* 56 Ala. 166; 1 Burr's Trial, 245; *Queen v. Boyes,* 1 B. & S. 311. In the last case cited it is declared "that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence that the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." The fact that a witness may be asked to testify concerning a fact which is not a part of a criminal transaction, but is material in a prosecution based on such a transaction, as giving his name or his presence in some locality remote from the scene of crime, or stating whether he was, in fact, a public official at the time it is claimed the offense was committed, do not in themselves constitute incriminating statements tending to show him guilty of crime, though upon a prosecution for some offense it may develop that they are material. It is manifest that if defendant were testifying in another case and he were asked his name, his residence, or whether he had been a certain official at a specified time, it could not be urged that he need not answer upon the ground that it might expose him to a prosecution for a

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crime, for in themselves they do not tend to show criminality, though a combination of circumstances in connection with some criminal transaction might make it material to show them in a criminal prosecution.

"It is obvious, . . . that the notion of a fact 'tending to criminate' is that of a fact forming, in the phrase of Chief Justice MARSHALL, 'a necessary and essential part of a crime.'" 3 Wigmore, Evidence, § 2261.

Mr. Wharton, in his Criminal Evidence (9th ed.) § 466, speaking on this subject, states:

"We have several rulings to the effect that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be furthered. This proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give which might not become a part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution. . . . The question is for the discretion of the judge, and in exercising this discretion he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But in any view the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency."

Tested by this rule, we cannot conceive how the bare statement by defendant that at a certain time he was an alderman of the city of Milwaukee, a fact which must obviously have been generally known, could in any degree aid in tending to expose him to the danger of a prosecution for a crime. To give it such significance would certainly be speculative and imaginary; such a result would not follow naturally from such a statement. The following cases have a bearing on this subject: *Brown v. Walker,* 161 U. S. 591, 16 Sup. Ct.

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644; *Miskimmins v. Shaver,* 8 Wyo. 392, 58 Pac. 411; *Ex parte Irvine,* 74 Fed. 954. See, also, 1 Greenleaf, Evidence (16th ed.) § 469*d et seq.*

It is claimed that the court erred in receiving the evidence of Hamilton and Pease concerning statements made in the clerk's office and before the members of the committee having this claim in charge, and to the effect that, if the claim were not allowed by the committee and council, Hamilton would seek to enforce it by suit. The evidence tends to show that defendant participated in the committee proceeding while this claim was being considered, and that he probably was informed of the claimant's threatened enforcement by suit if it were disallowed by the common council. Under these circumstances the ruling was proper.

Further claim is made that the conversation elicited from Mr. Rose on cross-examination was improper, because it in nowise related to what he, as defendant's witness, had testified on direct examination, which tended to impeach the witness Hamilton, called by the state. It appears sufficiently that this conversation had a bearing on testimony given on direct examination and served to explain it. This made it relevant, and it could properly be adduced on cross-examination.

We find no error in the record.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

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KELLNER, Respondent, vs. FIRE ASSOCIATION OF PHILADELPHIA, imp., Appellant.

February 1—May 8, 1906.

Fire insurance: Policy issued to carrier on goods in its custody: Construction: Property covered: Rights of owners: Proofs of loss.

1. Where goods shipped to plaintiff were allowed, in accordance with an arrangement of long standing between him and the carrier, to remain in the latter's warehouse until plaintiff should by written order direct delivery to his customers, such goods were in the custody of the carrier "as warehouseman, forwarder, carrier, or otherwise," within the meaning of a fire insurance policy issued to the carrier.
2. A policy issued to a carrier and insuring it "and other owners as interest may appear" against loss by fire "on merchandise and property of every description, loaded or not loaded in cars, including freight, back charges, charges, advances, liens, and claims thereon, their own or in their custody as warehousemen, forwarders, carriers, or otherwise, contained in" a certain warehouse, covers the property designated and not merely the carrier's interest or liability in respect to it.
3. A stipulation in such a policy provided that the carrier, although it may or may not be liable for any loss, shall, after a loss, give notice to said assurer who was insured thereby, and that said notice shall be conclusive upon the assurer as to who, in addition to said carrier, was so insured. *Held*, that this gave the carrier no right to cut off, by electing not to include, certain owners of property covered by the policy.
4. Under such a policy an owner of property covered thereby had a right, when a loss occurred, to adopt the acts of his agent, the carrier, and thereby to secure the benefit resulting from the policy, the same as if it had originally been issued to such owner.
5. The insurance company was notified of a fire by the assured soon after its occurrence, and the assured submitted an itemized statement of the different articles destroyed, in the form of two schedules, one containing those articles which the assured claimed were covered by the policy, and the other containing the articles (including plaintiff's goods) which may have been covered. *Held*, that this was sufficient notice and proof of loss to entitle plaintiff to enforce his claim against the insurer.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

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This action is brought to recover the value of property destroyed by fire and which is claimed to have been covered by and included in the policies of insurance issued by the appellant and other insurance companies. Between March 29 and May 20, 1895, these insurance companies, pursuant to agreement, delivered to the Erie & Western Transportation Company their policies of insurance. The insurance clause of appellant's policy and of the other companies provides that:

"The Erie & Western Transportation Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Canal & Lake Steamboat Company, and other owners as interest may appear, are hereby insured against loss by fire on merchandise and property of every description, loaded or not loaded in cars, including freight, back charges, charges, advances, liens, and claims thereon, their own or in their custody as warehousemen, forwarders, carriers, or otherwise, contained in building known as the Chicago, Milwaukee & St. Paul Company's freight house No. 10," situated at Milwaukee, Wisconsin.

During the life of these policies the Erie & Western Transportation Company received at a lake port a shipment of coffee belonging to the plaintiff and shipped from Baltimore to Milwaukee. The company carried the coffee to Milwaukee and on August 11, 1895, unloaded it from the boat and placed the goods in the warehouse designated in the policies. They were accustomed to receive and store their goods in this warehouse. On August 22, 1895, the warehouse and other property, among which was plaintiff's coffee, were destroyed by fire. For many years plaintiff had been a coffee merchant at Milwaukee. He had shipped his goods over the defendant transportation company's line of steamers for many years, and after their arrival and until sold had kept them with the company in their warehouse, the company making delivery to his customers on his orders, without making any charge against him, in addition to the transportation charges, for this accommodation. At the time of the fire part of the coffee had

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been delivered to plaintiff's customers upon his order. Plaintiff had paid the freight on August 19th. A few days after the fire the transportation company informed plaintiff of the insurance and requested a statement of his loss. Plaintiff furnished such statement. Afterwards the transportation company, by agreement with the insurance companies, which denied liability for plaintiff's loss and for some other property destroyed by the fire in the warehouse, submitted two statements, Exhibit A and Exhibit B; setting forth in Exhibit A that all the property named therein was covered by and included in the insurance, Exhibit B being a list of property destroyed by the fire, among which was plaintiff's, which may have been covered by the policies. By a provision of the policies the amount due was payable to the treasurer of the transportation company. The policies also provided that:

"The companies named herein as the assured (although they may or may not be liable for any loss) shall, after a loss, give notice to said assurer who was insured hereby, and said notice shall be conclusive upon the assurer as to who, in addition to the said companies, was so insured."

Plaintiff demanded that the transportation company collect his loss from the insurance companies, and upon the refusal of the treasurer of the transportation company to so do and the refusal of the insurance companies to pay him he brought this action.

The trial court awarded judgment in plaintiff's favor against defendants, apportioning plaintiff's loss among the several insurance companies in sums proportional to the amount of insurance carried by each company. The whole insurance amounted to $40,000. This is an appeal from such judgment.

For the appellant there was a brief by *W. H. Mylrea* and *Guy D. Goff,* and oral argument by *Mr. Mylrea* and *Mr. C. F. Hunter.* They contended, *inter alia,* that under a contract providing for the insurance of a specified person "and other

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owners, as interest may appear," or similar terms, the question as to who are the "other owners" is governed by the intention of the party taking out the policy at the time of the making of the contract. *The Sidney,* 23 Fed. 88, 93; *The Sydney,* 27 Fed. 119, 125; *Fire Ins. Asso. v. M. & M. Transp. Co.* 66 Md. 339, 348, 7 Atl. 905; *Steele v. Franklin F. Ins. Co.* 17 Pa. St. 290; *Duncan v. China Mut. Ins. Co.* 129 N. Y. 237; *Hooper v. Robinson,* 98 U. S. 528; *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *Sturm v. Boker,* 150 U. S. 312, 333; *Hagan v. Scottish Ins. Co.* 186 U. S. 423, 429, 430. When policies are written to cover the property of "whom it may concern," or "other owners," it must be admitted that there is at least an ambiguity as to who are the parties concerned and as to who are the owners; and under such circumstances extrinsic evidence is proper to make certain what otherwise would be uncertain. *Finney v. Bedford Comm. Ins. Co.* 8 Met. 348; *Shawmut S. R. Co. v. Hampden Mut. Ins. Co.* 12 Gray, 540; *German F. Ins. Co. v. Thompson,* 43 Kan. 567; *Paradise v. Sun Mut. Ins. Co.* 6 La. Ann. 596; *Catlett v. Pacific Ins. Co.* 1 Wend. 561; *Turner v. Burrows,* 8 Wend. 144; *Lee v. Adsit,* 37 N. Y. 78; *Clinton v. Hope Ins. Co.* 45 N. Y. 454; *Foster v. U. S. Ins. Co.* 11 Pick. 85. But in the case at bar there is no ambiguity. The contract by its very terms provides a method by which it may be determined who are the "owners as interest may appear," because the party taking out the insurance is authorized to determine after loss and notify the assurer who were the persons insured; and such notice is conclusive upon the assurer. The fundamental doctrine governing this class of policies "for whom it may concern," or "owners as interest may appear," rests in the law of agency. The party taking out the policy, or, in other words, making the contract, is supposed to act as the agent of the "owners as interest may appear," and this assumed agent's act is given force and vitality by the doctrine of ratification; and when, even after loss,

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the owner appears and claims under the contract, he ratifies it. *Augusta Ins. & B. Co. v. Abbott,* 12 Md. 348; *Newson's Adm'r v. Douglass,* 7 Harr. & J. 417; *Cincinnati Ins. Co. v. Rieman,* 1 Disney (Ohio) 396; *Haynes v. Rowe,* 40 Me. 181. To permit the plaintiff *Kellner* to recover on the contract is to say that a principal may ratify part of a contract made by his agent and disaffirm the balance of the contract, gaining thereby certain rights not contemplated by the parties to the agreement.

For the respondent there was a brief by *C. H. Van Alstine* and *Robert N. McMynn,* and oral argument by *Mr. Van Alstine.* They argued, among other things, that the policies cover the property of others in the custody of the applicants for the policies as warehousemen, forwarders, carriers, or otherwise, and not the interest of the applicants in the property of others created by liens thereon, or the liability of warehousemen, forwarders, or carriers. *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *Home Ins. Co. v. Peoria & P. U. R. Co.* 78 Ill. App. 137, affirmed *S. C.* 178 Ill. 64, 52 N. E. 862; *Robbins v. Firemen's Fund Ins. Co.* 16 Blatch. 122, 126; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.* 41 Fed. 271, 273; *Comm. v. Hide & L. Ins. Co.* 112 Mass. 156; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 400, 401. Parol evidence was offered to the effect that the transportation company intended only to insure such owners of merchandise in the freight house described as it should be liable to in case of the loss of their property by fire, but the insuring clause of the policy is not ambiguous and the evidence was inadmissible. *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *California Ins. Co. v. Union C. Co.* 133 U. S. 387, 418; *Hough v. People's F. Ins. Co.* 36 Md. 398; *Fire Ins. Asso. v. M. & M. Transp. Co.* 66 Md. 339. Although the transportation company obtained the policies and paid the premiums, the policies covered such persons and property as that company intended them to cover at the time the policies

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were issued. *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 613; *Duncan v. China Mut. Ins. Co.* 129 N. Y. 237; *Hooper v. Robinson,* 98 U. S. 528; *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527; *Sturm v. Boker,* 150 U. S. 312, 333; *Hagan v. Scottish Ins. Co.* 186 U. S. 423, 429, 430, 433; *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; *Johannes v. Phenix Ins. Co.* 66 Wis. 50; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395; *Johnston v. Charles Abresch Co.* 123 Wis. 130. The notice clause does not operate to cut down or restrict the general language of the insuring clause. It was inserted for the purpose of requiring the applicants for the policies to give to the insurance companies, after a loss, the names of those for whom they were at the time of the fire acting in the capacity of warehousemen, forwarders, carriers, or otherwise. This is a reasonable construction, and accords with just what the companies named as the assured did do, as evidenced by the contract of February 12, 1896.

The following opinion was filed February 23, 1906:

SIEBECKER, J. The contract of insurance provides that the transportation company "and other owners as interest may appear" are to be indemnified against loss by fire of the property described and contained in the warehouse specified in the policies, including certain claims thereon, whether "their own or in their custody as warehousemen, forwarders, carriers, or otherwise." It is contended that this agreement covers only such property and such interest therein as the transportation company and the insurance companies intended to include; that from the phraseology employed it is manifest that the transportation and insurance companies contemplated only such property and interests in property as the transportation company had within its warehouse and to which it saw fit to attach the insurance; and that this intention of the parties to the insurance is shown by the subsequent provisions of the policies, authorizing the transportation company to

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designate what owners of property were to be included in the policies. Neither the transportation company nor the insurance companies deny that the policies cover the interest of the owners of the property designated in Schedule A, which was property stored in the warehouse at the time of the fire and held in the custody of the transportation company in the course of its business. It is urged, however, that plaintiff's property was not held by the transportation company, but that he left it in the warehouse after delivery for his accommodation, and not within the possession or control of the transportation company as his agent, and for this reason he cannot be deemed to come within the terms of the policy. It may be assumed that the transportation company gave immediate notice to plaintiff of the arrival of his goods; the facts, however, show that they were held for him in the course of their business arrangements until by written order he directed delivery to his customers. It seems that this arrangement was of long standing and was an inducement to plaintiff to ship his goods over the transportation company's line. There can be no serious question but that plaintiff would have been liable for reasonable additional charges for such storage of his goods had the company chosen to demand it. Under these circumstances the transportation company was the custodian of the goods of the plaintiff, and as such, under the agency specified by the broad terms of the policies, held them for plaintiff, either "as warehousemen, forwarders, carriers, or otherwise." This brought plaintiff within the conditions of the policies and effected insurance on his property in the company's custody, unless it be considered that no indemnity was undertaken against its loss under the insurance clause covering the property of the transportation company and "other owners as interest may appear." The language of this clause in the policy is unambiguous and plain and insures the property designated against loss, and cannot be limited to the interest or liability of the transportation company in respect to

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it. This harmonizes with the interpretation given to the contract by the insurance and transportation companies as to a portion of the property destroyed, in that they thereby recognized the insurance as being upon the property in the custody of the transportation company and not an insurance of only such property as might be selected by the transportation company. *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 393, 80 N. W. 467; *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 27 N. W. 414; *Johnston v. Charles Abresch Co.* 123 Wis. 130, 101 N. W. 395, and cases cited.

It is insisted, however, that this construction of the contract is opposed by the subsequent stipulation providing that "the companies named herein as the assured (although they may or may not be liable for any loss) shall, after a loss, give notice to said assurer who was insured hereby, and said notice shall be conclusive upon the assurer as to who, in addition to said companies, was so insured." It is averred that the terms of this stipulation clearly show that the indemnity for loss was to be limited to the property which the transportation company elected to include. Practically, this construction allows the transportation company at its option to cut off any and all claims for loss of property in its custody which was plainly covered by the terms of the policies, and thereby to deprive the owner of the lost property of a right clearly within the terms of the agreement. Such a construction should not be approved if the agreement can be given a reasonable meaning consonant with the intention expressed in the other parts of the policies and by which the rights and interests of the property owners will be preserved. In effecting the insurance the transportation company acted as the representative and agent of the property covered by the terms of the policies, by the terms it fixed the class of owners whose property was insured, and by the notice clause it undertook to notify the insurance companies of what persons were in

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fact so insured; and the insurance companies assented to the conclusiveness of such ownership. Under the notice this provision in effect provided that the insurance companies were bound, as to who were the owners of the property destroyed, by the notice of the transportation company, but it gave the transportation company no power to cut off any right acquired by owners of property covered by the insurance clause. This interpretation of the stipulation gives reasonable significance to its terms and preserves the rights of all the parties under the other agreements of the policies. Such a construction seems to be the plain meaning of the language employed, which must be deemed to have been so used by the contracting parties. This results in giving effect to all parts of the policies as undertakings to indemnify all of the class of owners in which the transportation company had a special interest, and therefore it includes every person embraced in the class. Under such circumstances the owners had the right, when the loss occurred, to adopt the acts of their agent, the transportation company, and thereby to secure the benefit resulting from the policies, just as though they had originally been expressly issued to them. *Johnston v. Charles Abresch Co., supra,* and cases cited. This right was asserted by the plaintiff in his claim after the fire and it was sufficiently brought to the attention of the assurers and the other assured.

We find no foundation for the claim that the action cannot be maintained because there is no evidence showing that notice and proof of loss were given and made as required by the contract. It appears that the insurance companies were notified of the fire by the assured soon after its occurrence, and that the assured submitted an itemized statement of the different articles destroyed by the fire; this statement being in the form of two schedules, designated as "A" and "B," the former containing those articles which the assured claimed were included, and the latter those articles and the names of the owners which may have been insured under the policy.

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This notice is not disputed, but it seems that there is a dispute between the parties as to whether the property described in the latter list was covered by the insurance. We must hold that the assured gave notice and submitted adequate proof of loss to entitle plaintiff to enforce his claim in this action. *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 51 N. W. 1122; *Flatley v. Phenix Ins. Co.* 95 Wis. 618, 70 N. W. 828; *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied May 8, 1906.

STEPHENSON and others (executors and trustees) and STEPHENSON and another (personally), Respondents, vs. NORRIS (an infant), Appellant, and PARKER and others, Respondents.

SAME, Respondents, vs. DICKSON and another (infants), Appellants, and PARKER and others, Respondents.

SAME, Respondents, vs. PRATT and others (infants), Appellants.

February 27—May 8, 1906.

Wills: Action for construction: Jurisdiction: Circuit and county courts: Powers of trustees: Discretion as to apportionment of estate: Unpaid notes of beneficiaries held by testator: Discharge in bankruptcy: Interest: Allowances to guardians ad litem.

1. Executors and testamentary trustees, when they have real and serious doubts as to their duty, may, for their own protection, maintain an action in the circuit court for construction of the will, although no actual litigation or contest in respect thereto is pending.
2. The mere fact that the questions involved would eventually arise for consideration in the county court, or that that court, under ch. 163, Laws of 1905, has power to construe a will in a proceeding brought solely for that purpose, does not make it improper for the circuit court to entertain such an action.

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3. In each of several items a will provided that certain of the shares into which the estate was to be divided be held in trust by the executors during the term of two lives and nineteen years thereafter for the benefit of a certain person and his or her descendants, and directed or authorized the trustees, upon the termination of the trust or, in certain contingencies, before that time, to pay and transfer both the principal and income of said shares to the descendants, "giving to each of said descendants such portion thereof as my said trustees shall deem best." *Held*, that under the powers so granted the executors and trustees were permitted, in the exercise of a sound legal discretion, not arbitrarily nor through whim or caprice, to apportion the sums so given among the beneficiaries equally or unequally, or to give the whole to one or more, to the entire exclusion of the others. MARSHALL, J., dissents.

4. A subsequent item in the will—giving to the trustees discretion, as to all the provisions of the will, to withhold or diminish the share of any beneficiary who in their opinion should be unworthy or should not be of sufficient capacity properly to use and care for it—did not change or limit the general discretion as to apportionment given by the prior items, especially where such subsequent item itself, as well as other portions of the will, referred to and recognized that general discretion as another and different discretion from the discretion to withhold because of incapacity or unworthiness. MARSHALL, J., dissents.

5. The will directed that all notes and obligations of any beneficiary or his descendants held by the testator at his death, including obligations barred by the statute of limitations, be appraised at the full amount of principal and interest unpaid and owing at the time of the death, and requested the trustees, in making division of the estate into parts, to assign said obligations to the parts to be held in trust for such beneficiary, it being expressly declared to be the testator's intention that no relative or his descendants benefited by the will should obtain an advantage over any other by reason of any advancement or assistance rendered to him or his descendants by the testator and evidenced by any such unpaid note or obligation held by the testator at the time of his death. *Held* that, notwithstanding a discharge in bankruptcy of a descendant of one of the beneficiaries named in the will, prior to the death of the testator, his notes given before such discharge and held by the testator at the time of his death must be considered unpaid obligations, to be assigned to and charged up against the share to be held in trust for such beneficiary and his descendants.

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6. Under the terms of the will, in assigning such obligations to the share of the estate to be held in trust for said beneficiary and his descendants, they should be appraised at the full amount of the principal and interest unpaid thereon at the time of the testator's death; and the trustees were authorized, in their discretion, to withhold from the maker of the notes and his descendants so much of the income and principal otherwise passing to them, from time to time, as would equal the full amount of principal and interest unpaid from time to time upon said notes, and to distribute the amount so withheld among the other descendants of said beneficiary named in the will.
7. In an action brought by executors to obtain a construction of the will, allowances to the guardian *ad litem* of an infant brought in as defendant should not be made payable out of the body of the estate, but should be made payable only out of the infant's property under the control of the court, giving a lien thereon if necessary.

APPEALS from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

This is an action brought in the circuit court to construe the will of Daniel Wells, Jr., who died March 18, 1902. The action is brought by the executors and trustees named in the will against all the legatees, many of whom are minors. The estate bequeathed was very large, and the original will, executed February 20, 1897, was long and complicated, and was subsequently modified by three separate codicils. The complaint sets forth the death of the testator and the subsequent probate of the will and codicils in the county court of Milwaukee county, the names of all the heirs and legatees, the provisions of the will and codicils, also certain facts as to the indebtedness of certain beneficiaries to the estate of the testator, and alleges that they are advised that very serious doubts exist as to the meaning of certain provisions of the will, and that it is necessary for the protection of the legatees and devisees, as well as for the aid of trustees, that they should have the advice of the court in the premises, and they pray that the court construe the will and adjudge the mean-

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ing thereof in certain particulars which were put in the form of twenty-two questions in the prayer of the complaint. Guardians *ad litem* were thereafter duly appointed for the infant defendants, and these guardians made answer to the complaint submitting the rights of their wards to the court, and, after judgment construing the will and the codicils, three of said guardians appealed to this court.

By the first four items of the will the testator revoked former wills, directed payment of his debts, and made five specific bequests which are not here in question. By the fifth item he gave to his daughter, Fanny Wells Norris, certain specific personal property. By the sixth item he devised all the rest and remainder of his estate to *Isaac Stephenson, Horace A. J. Upham,* and Charles D. Nash, their survivors and successors in trust, to hold the same during the term of the life of his daughter, Fanny Wells Norris, and her son, *Daniel Wells Norris,* and nineteen years thereafter (except that the property named in the seventh item of the will was only to be held during the lifetime of the daughter), in trust for the following purposes and with the following powers: Said executors and trustees were directed to divide the entire estate into eighty-one shares not later than five years after the decease of the testator, said shares to be numbered from one to eighty-one, inclusive, seventy-nine of the shares being equal in amount, and the other two shares being equal to each other but only one half as large as one of the seventy-nine shares. His trustees were also authorized to convert all his real estate into money, and his personal property into real estate, at their discretion, and to organize one or more corporations as they might deem best, and convey to such corporation or corporations such property as they might deem best, and distribute the capital stock thereof among the shares aforesaid as they should deem best. By the seventh item of the will, as modified by the second codicil, the trustees were directed to hold twelve shares of said estate in trust during the life of

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his daughter, Fanny Wells Norris, for the benefit of his friends, *Isaac Stephenson* and *Horace A. J. Upham,* and any person or persons whom they or their survivor might designate in writing. By the eighth item of the will the trustees were directed to hold twenty-four and one-half shares in trust during the life of his daughter, Fanny Wells Norris, and her son, *Daniel Wells Norris,* and nineteen years thereafter, for the benefit of said daughter and her lawful descendants, and to pay quarterly the net annual income thereon to said daughter, and upon her death to her lawful descendants, giving to each of said descendants such portion thereof as such trustees shall deem best, and on the termination of the trust to pay whatever remains thereof to the then lawful descendants of his said daughter, giving to each such portion thereof as the said trustees shall deem best. Provision is also made in said item for the disposition among other relatives of the deceased of the said twenty-four and one-half shares in case of the deaths of said Fanny Wells Norris and all her lawful descendants prior to the termination of the trust. By the ninth item of the will twenty-four and one-half shares of the trust estate are to be held in trust as directed for the benefit of *Daniel Wells Norris,* with specific directions as to the use of the income and the division of the principal at the termination of the trust. By the tenth item of the will four shares of the estate were directed to be held in trust for the benefit of Sarah H. Wells, widow of a deceased brother of the testator, and of her lawful descendants. By the eleventh item of the will four of said shares are directed to be held in trust for the benefit of the testator's sister Hannah A. Pratt and her lawful descendants. By the twelfth item of the will four shares are directed to be held in trust for the benefit of the testator's sister Susan J. Brown and her lawful descendants. By the thirteenth item three shares are directed to be held in trust for the benefit of the testator's niece Marcia E. Dickson and her lawful descendants. By the fourteenth item four shares are directed

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to be held in trust for the benefit of the lawful descendants of the testator's deceased sister Sarah J. Parker. In all the foregoing items it is specifically provided, in case of payments to be made to the descendants of any beneficiary, that the income as well as the principal is to be divided among such descendants "in such portions to each as my said trustees shall deem best."

The fifteenth item of the will, as amended by one of the codicils, reads as follows:

"In case any person or persons otherwise entitled to any portion of my estate, under any provision of this will, shall, in the opinion of my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, not be either of good habits or of sufficient capacity to properly use or to take care of the portion of such property so coming to him or her, or shall not be likely, for any reason whatever, in the opinion of my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, to properly make use of the portion of such property so coming to him or her, then I empower my said trustees and executors, the survivors and survivor of them and their respective successors in trust, to withhold from every such person, whomsoever he or she may be, his or her portion of my estate and of the income and benefits thereof, as unworthy to receive the same, and to pay to every such person only so much of the portion of my estate otherwise coming to such person as my said trustees or executors, the survivors or survivor of them or their respective successors in trust, having charge of that portion of my estate, shall deem advisable, and in case my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, shall deem it best, instead of paying and transferring to any such person any portion of my estate, themselves to expend the same or any portion thereof for his or her benefit or support, then I hereby authorize my said trustees and executors, the survivors and survivor of them and their respective successors in trust, so to do, subject, always, to the provision that nothing herein contained shall, in any way, extend the duration of the several terms of trust beyond the time provided for in item sixth

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of this will. Whatever of my estate, including principal, income, or other beneficial use thereof, shall be withheld from any one, by reason of his or her not being of such good habits or of sufficient capacity or for any other reason, as above provided, not worthy, in the opinion of said trustees or executors, the survivors or survivor of them or their respective successors in trust, to receive his or her portion of my estate, and shall not have been expended by my said trustees or executors, the survivors or survivor of them or their respective successors in trust, for the benefit and comfortable support of such person, shall be transferred to the person or persons who would have taken such property so withheld, in case the person from whom it shall be withheld, as above provided, had been dead at the time of such withholding. In case any person or persons from whom any portion of my estate shall have been withheld by my said trustees or executors, the survivors or survivor of them or their respective successors in trust, as aforesaid, shall have changed and shall have become worthy, in the opinion of my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, to receive his or her portion of my estate, then I direct that the fact that my said trustees or executors, the survivors or survivor of them or their respective successors in trust, may have, at any time, withheld from such person a portion of my estate, shall not thereafter prevent such person from receiving his or her share of my estate, in any distribution either of principal or income that shall thereafter be made by my said trustees or executors, the survivors or survivor of them or their respective successors in trust; but the fact that any such person shall have become worthy to receive a portion of my estate, after having been deemed unworthy to receive the same as aforesaid, shall not entitle such person to receive any portion of my estate that shall have been once withheld from him or her in any previous distribution by my said trustees or executors, or the survivors or survivor of them or their respective successors in trust.

"In order that there may be no difficulty in construing this will, I hereby expressly direct that the foregoing provisions of this fifteenth item are to govern in all cases, and that all other provisions of this will, including all of items numbered from eight (8) to fourteen (14), both inclusive, and all pre-

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vious and all subsequent parts of this will, are expressly subject to such changes and modifications as my said trustees and executors or either of them, or the survivors or survivor of them or their respective successors in trust, are authorized to make by this fifteenth item, on account of any person not being of good habits, or of sufficient capacity, or for any other reason not worthy, in the opinion of my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, to receive his or her portion of my estate.

"Except as hereinbefore provided in case of any one not being of good habits or of sufficient capacity, or for any other reason unworthy, in the opinion of my said trustees or executors, or the survivors or survivor of them or their respective successors in trust, to receive his or her portion of my estate, and except as to the bequests to the issue of my said daughter, Fanny Wells Norris, as provided in the ninth item of this will, I desire my trustees and executors, the survivors or survivor of them and their respective successors in trust, in exercising the discretion given to them by this will in paying and transferring to the descendants of any person mentioned or referred to, directly or indirectly, in this will any portion of my estate, to make such payments and transfers to the parent to the exclusion of his issue; that is to say, the parent, during his lifetime, shall be preferred to his issue. I do not intend this as mandatory, but merely as expressing a wish that may aid my trustees and executors, the survivors and survivor of them and their successors in trust, to carry out the discretion given to them, and that no child shall be entitled to a portion of or interest in my estate during the lifetime of its ancestor, unless my said trustees and executors, the survivors or survivor of them or their successors in trust, shall deem it best to prefer, in any particular case, the child to the exclusion of its living ancestor, in which case I authorize and empower them so to do.

"In case of the death of any one who would, if living, have been entitled to any portion of my estate, or any interest therein, under any provision of this will, prior to the time of such one last mentioned coming into the enjoyment thereof, it is my will, unless herein otherwise provided, that the lawful descendants of every such person shall take and have by right of representation the portion of and interest in my estate that

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such deceased person would have taken and had, if living, subject, always, nevertheless, to such changes and modifications as my said trustees and executors, the survivors and survivor of them and their respective successors in trust, are authorized to make under any provision of this will.

"It is my will that the judgment and opinion of my said trustees or executors, the survivors or survivor of them or their respective successors in trust, respectively, as to the good habits and sufficient capacity or worthiness, as aforesaid, of any one entitled to any portion of my estate, shall be final and conclusive.

"In case of the death of any one for whom provision is made herein and of all of his lawful descendants, prior to the time of his or their entering upon the enjoyment of the portion of my estate that he and they would have received and enjoyed if living, and there is contained in this will no provision herein expressed providing who shall take such portion of my estate last mentioned in case of the happening of such contingency, then I give, devise, and bequeath that portion of my estate last mentioned to the heirs of my father, to have and to hold the same to them, their heirs and assigns forever, giving to each heir of my father such portion thereof as my said executors and trustees, the survivors and survivor of them and their respective successors in trust, shall deem best. My executors and trustees, the survivors and survivor of them and their respective successors in trust, are respectively authorized to make advances, from time to time, as soon after my decease as they may deem best and prior to the actual division of my estate into eighty-one (81) shares or parts as herein provided, to any person entitled to any portion thereof of such sum or portions as my said executors or trustees, the survivors or survivor of them or their respective successors in trust, shall deem advisable, to be received upon account of such person's interest in my estate.

"Prior to the actual division of my estate into eighty-one (81) shares or parts, as herein provided, I authorize my said trustees and executors, the survivors and survivor of them and their respective successive successors in trust, to pay quarterly the net annual income of my estate to such persons and in such portions to each, as said persons, respectively, would be entitled to receive had such division into eighty-one (81),

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parts been made immediately after my death. If, for any reason, my said executors or trustees, the survivors or survivor of them or their respective successors in trust, are unable in any case, either prior or subsequent to the said division into eighty-one (81) shares or parts, to ascertain the exact amount to be paid at a particular time to any person on account of his portion of the net annual income of my estate or of any portion thereof, then said executors or trustees, the survivors or survivor of them or their respective successors in trust, may make such partial payment on account thereof as they deem advisable, and make the remaining payment as soon as they shall have ascertained what the exact amount of the same shall be.

"After the division of my estate into eighty-one (81) shares or parts shall have been made and the numbers of said shares or parts shall have been assigned to them, respectively, as hereinabove provided, no subsequent change in values of any portion thereof shall affect or alter any such division, in any way."

The twenty-sixth item of the will reads as follows:

"I direct that all notes, bonds, contracts, agreements, and obligations held by me at the time of my death upon which any person shall be indebted or liable to me who shall be beneficially interested in any provision of my will, or upon which the husband or wife or any of the issue of such person so beneficially interested in any provision of this will shall be indebted or liable to me, if not collected by my executors or trustees before the division of my estate into eighty-one (81) shares or parts, as heretofore provided in this will, shall, for the purpose of the division of my estate into said eighty-one (81) shares or parts, be appraised at the full amount of principal and accrued interest unpaid and owing to me thereon at the time of my death, including any and all such notes, bonds, contracts, agreements, and obligations that are barred by the statute of limitations, as well as those that are not so barred; and all such notes, bonds, contracts, agreements, and obligations, I request my said trustees, in making the division of my estate into eighty-one (81) shares or parts, as hereinbefore provided, to assign to the specific shares or parts respectively, of my estate, in which such person shall be beneficially interested under the provisions of this will. It is

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my will, in case the shares or parts of my estate in which any such person shall be beneficially interested under my will shall be less than the amount of such indebtedness or liability to me which shall be properly assignable to such shares or parts, that the excess of such indebtedness or liability to me shall constitute a portion of my estate and shall be so distributed among all the other remaining shares or parts of my estate as my said trustees, in making the division thereof into eighty-one (81) shares or parts as hereinbefore directed, shall deem best; it being my intention hereby to provide more fully for the equitable division of my estate into eighty-one (81) shares or parts, so that no one of my said relatives or the husband or wife or issue of any such relative who shall be benefited by my said will shall obtain an advantage over any other person by reason of any advancement or assistance I may have, before my death, rendered to such relative or the husband or wife or any issue of the same, and which advancement or assistance shall be evidenced by any such unpaid note, bond, contract, agreement, or obligation unpaid and held by me at the time of my death."

It is unnecessary to state, even in substance, the remaining items of the will, as they have no bearing on the present controversy. Nor is it necessary to state the provisions of the three codicils.

The court made findings specifically answering each of the twenty-two questions propounded by the complaint, and further found that the services of the various guardians *ad litem* were necessarily performed for the general benefit of the entire estate; that the reasonable value of the services to each of said guardians was the sum of $800, and that said sum should be allowed and paid out of the trust estate at large. The court further directed that the allowance to be made to the executors and trustees for the services of their counsel be fixed by the county court, to be paid out of the trust estate. As the findings excepted to are specially set forth in the opinion it will be unnecessary to recite them at length here. Judgment construing the will was entered in accordance with the findings of the court.

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Glenway Maxon, guardian *ad litem,* for the appellant *Daniel Wells Norris.*

Charles D. Mann, guardian *ad litem,* for the appellants *Andrew C. Dickson* and *Jessie Dickson.*

For the appellants *Ralph S. Pratt* and others (respondents on other appeals) there was a brief by *Frank B. Van Valkenburgh,* guardian *ad litem,* and *Charles A. Vilas,* of counsel, and oral argument by *Mr. Van Valkenburgh.*

Alfred L. Cary and *William E. Black,* for the plaintiffs and respondents.

John F. Harper, guardian *ad litem,* for the infant defendants *Sumner W. Parker* and others.

For the infant respondents *Gilbert Wells, Percy W. Cushing,* and *Mary W. Cushing* there was a brief by their guardian *ad litem, W. D. Van Dyke.*

For the infant respondents *Marcia Dickson Jones* and others there was a brief by *F. H. Bottum,* their guardian *ad litem,* and *Ryan, Ogden & Bottum,* of counsel, and oral argument by *L. M. Ogden.*

For the infant respondents *Kenneth Fisher Bingham* and others there was a brief by their guardian *ad litem, Cornelius I. Haring.*

The following opinion was filed March 20, 1906:

WINSLOW, J. The guardian *ad litem* of *Daniel Wells Norris* assigned three errors, viz.: (1) That the complaint does not state a cause of action; (2) that the circuit court should not have assumed jurisdiction, inasmuch as the settlement of the estate was proceeding in the county court; and (3) that compensation for the various guardians *ad litem* should not have been ordered to be paid out of the body of the estate. The first two of these contentions will now be considered, and the third will be taken up at the close of this opinion.

The plenary jurisdiction which the circuit court possesses, as the legitimate successor of the ancient court of chancery,

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over actions for the construction of wills, especially where trust powers are involved, is so well established that it is not open to doubt or discussion. *Heiss v. Murphey,* 40 Wis. 276; *S. C.* 43 Wis. 45; *Miller v. Drane,* 100 Wis. 1, 3, 75 N. W. 413. Nor in such cases is it necessary that there should be an actual litigation begun or contest pending to justify the court in entertaining the action. A trustee is entitled to the protection of the court in the execution of his trusts, and, when real and serious doubts confront him as to his duty, is entitled to the advice of the court to guide him. This court has said that in such a case "it is not the mere right, it is almost the duty, of the executor to take the opinion of the court upon the construction of the will and the validity of the disposition which it purports to make of the testator's property." *Heiss v. Murphey,* 43 Wis. 45. See, also, 28 Am. & Eng. Ency. of Law (2d ed.) 1050, 1051, and cases cited in note 8.

The complaint and will before us amply demonstrate that doubts might well be entertained as to the construction of a number of clauses of this long and involved will, and completely justify the course of the executors and trustees in asking for judicial guidance in the performance of their onerous and delicate duties.

Nor can it be said that this is one of the cases where the circuit court should refuse to entertain the action because the questions involved will eventually arise for consideration in the county court. This court has said that nothing short of an express statute will make the jurisdiction of the county court exclusive in such cases. *Miller v. Drane, supra; Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304. Ch. 163, Laws of 1905, passed after the present suit had been begun, gave formal and express recognition to the power of the county court to construe wills in a proceeding brought solely for that purpose; but it did not purport to abridge the already existing power of the circuit court to do that same thing. We

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have no difficulty, therefore, in holding that the present action was well brought in the circuit court.

Passing to the questions of construction raised by the appeals, we find the most serious and comprehensive question to be that involving the extent of the discretion given to the executors and trustees under items 8 to 14 of the will. As will be seen by reference to these items, they are practically synonymous in their terms, so far as this question is involved. They all give certain shares of the estate in trust to the executors, directing them upon the happening of a certain event, such as the death of a certain beneficiary, or upon the termination of the period of trust, to pay to the lawful descendants of a specified beneficiary a certain portion of the estate, "giving to each of said descendants such portion thereof as my said trustees shall deem best." The respondents contend, and the court held in effect, that under the powers granted by these items the executors and trustees were permitted, in the exercise of a sound discretion, but without wilfulness or favor, or caprice or arbitrary action, to apportion the sums so given among the beneficiaries either in equal portions or in unequal portions, or by giving the whole to one or more to the entire exclusion of the other or others. Certain of the appellants contend, however, that from a consideration of the whole will it is evident that the testator contemplated that each beneficiary of a class, under items 8 to 14, should receive an equal portion, unless it should be withheld by the trustees by reason of lack of good habits, unworthiness, or incapacity under item 15 of the will. This contention certainly calls for careful examination of the whole will and a comprehension of the testator's entire scheme. There can be little or no doubt as to the general character of that scheme. The testator was a man of great wealth. He evidently viewed his estate as a great business enterprise, an entity which he desired should be kept substantially intact for many years after his death. He there-

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fore placed it in the hands of trusted persons with the most full and carefully specified powers, for the benefit, ultimately, of his father's descendants. His desire that it should remain an entity, presumably as a great corporation, with the beneficiaries as stockholders, is very apparent. The duration of the trusteeship as contemplated might be well towards a century. Many of the ultimate beneficiaries were yet to be born, and of their character or abilities he could know nothing, and so, in order to conserve the property, save it from dissipation by unknown beneficiaries, and insure its enjoyment by the members of his father's family, with due regard to their various needs and abilities, he evidently intended to vest unusually broad and comprehensive powers in his trustees and their successors.

Eliminating from consideration, for the moment, the provisions of item 15, and viewing items 8 to 14, inclusive, as if they stood alone in the will, it seems that there could be little doubt as to the testator's intent. The words "giving to each such portion as my said trustees shall deem best," which are so industriously and carefully used so many times, do not mean "giving to each an equal portion," nor can they be made to mean that by any rule of construction of which we are aware. They are simple words of well-understood meaning, and are neither technical nor occult. They can be made no simpler or plainer by definition or construction. One might as well attempt "to gild refined gold or paint the lily." Our statute governing the construction of powers relating to real property (sec. 2126, Stats. 1898) provides that "when the terms of a power import that the estate or fund is to be distributed between the persons so designated in such manner or proportions as the trustee of the power may think proper the trustee may allot the whole to any one or more of such persons in exclusion of the others." While it is probable that the property disposed of under this will should be considered as personal property, under the rule of equitable conversion, this

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legislative construction of a similar power over real estate is certainly of significance.

But, of course, the natural and plain significance of words in one portion of a will may be changed and controlled by other provisions contained in the same will, if it appears from the whole will that such change or control was intended by the testator, and so we pass to the consideration of item 15 and other subsequent clauses. Before considering them, however, it is certainly significant to note that nowhere in items 8 to 14 is it expressly or impliedly indicated that the discretion to apportion, so plainly given by those items, is to be referred to or governed by the provisions of item 15. That item will be found at length in the statement of the case, and hence it will only be necessary here to state its substance, so far as material to this question. It provides in effect that if any beneficiary shall, in the opinion of the trustees, not be of good habits, or of sufficient capacity to properly use and care for the property coming to him, or not likely to so use it, then the trustees are empowered to withhold from him his portion of the estate or income, and pay him only such portion as to the trustees seems advisable, or themselves expend it for the beneficiary's benefit, provided that if the beneficiary becomes worthy, in the opinion of the trustees, then the fact of his previous unworthiness shall not prevent his sharing in subsequent distributions of principal or income. The item further provides that its provisions are to govern in all cases; that all the provisions of the will, including items 8 to 14, are to be subject to the changes authorized to be made by the trustees under this item on account of unworthiness, lack of capacity, or good habits, but that except as provided in this item in case of unworthiness or incapacity, and except as to the bequests under the ninth item, the trustees are desired, *in exercising the discretion given them by this will,* to make payment or transfers to a parent during his lifetime in preference to his issue (this not being mandatory, but merely expressed as a wish which

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may aid the trustees in carrying out the discretion given them); that, in case of the death of any beneficiary before the time of his coming into enjoyment of his bequest, his lawful descendants shall take his share, subject to such changes as the trustees are authorized to make under *any provision* of the will.

The contention is that, taking item 15 in connection with items 8 to 14, inclusive, it is apparent that the testator intended his beneficiaries in the same class to share equally, unless the trustees should, for unworthiness or incapacity, withhold all or a part of the share of a beneficiary under item 15; in other words, that the only discretion to withhold or diminish a share is the discretion conferred by item 15. We have not been able to agree with this contention. Under this construction the words "giving to each such portion thereof as my executors shall deem best," so carefully repeated in items 8 to 14, become absolutely unnecessary and meaningless, because the discretion vested in the trustees by item 15 is expressly made applicable to all items of the will. But, aside from this, item 15 by its very terms recognizes another and different discretion from the discretion to withhold because of incapacity or unworthiness. It says that except in cases of unworthiness or incapacity, and except as to the bequests in the ninth item, the trustees are desired, in "exercising the discretion given to them by this will," to prefer living parents to their children. Here a discretion is spoken of and recognized by the testator himself, as given by the will, which is *not* the discretion conferred by item 15. To what does this language refer? Indeed, to what can it refer, except to the general discretion to apportion as the executors deem best given by items 8 to 14? We have searched in vain for any answer to this question. The preference of parents over children is not to be based on habits, unworthiness, or incapacity, but the testator desires his executors to make such a preference in exercising the discretion given them by the will.

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Again, in the second codicil the testator suggests to his trustees that, in regard to the bequest to Susan W. Parker in the fourteenth item of the will, her age and infirmities be taken into consideration, and that the amount given her be no larger than reasonably necessary, in the opinion of the trustees, to afford her comfortable support for life, *"relying upon the discretion"* given to the trustees in said matter to do what they shall think best. The testator further suggests that, in fixing the amount to be paid to Sarah E. Matthews under the same item, an increased sum be given her on account of the greater number of her children in comparison to that of the other descendants of Sarah J. Parker, and again says that he relies upon the exercise of the discretion given to said trustees.

These various references to the discretion given to the trustees are entirely unexplainable upon any other basis than upon the basis that they possess a discretion entirely apart from the discretion to withhold upon the ground of unworthiness or incapacity under item 15. They refer to a general discretion; just such a discretion as results from the natural meaning of the words used in items 8 to 14. So referring them, they are harmonious and intelligible; otherwise they show lack of comprehension of the meaning of the will.

So we reach the conclusion that under items 8 to 14, inclusive, there was given to the executors and trustees a broad discretion to apportion the sums given to a class among its members entirely distinct from the discretion to withhold for unfitness or unworthiness under item 15, and that this discretion authorizes them to apportion equally or unequally, or to cut off one or more entirely and give the whole to the others. This is a very broad discretion and a very delicate one. It is not to be exercised arbitrarily, nor through whim or caprice, for this is not discretion. It must be a sound legal discretion, its conclusions must be based upon the application of the principles of right and justice to the facts, and the facts to be considered must be facts justly and legitimately bearing upon the

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comparative claims of the parties for recognition as recipients of the testator's bounty. The testator has himself suggested that there should be a preference given to living parents over their children, and that age, infirmities, and number of dependents are also entitled to be considered. Probably there may be other facts entitled to be considered by the trustees, but it is dangerous to attempt to lay down rules in advance. It is enough to say that there must be real and substantial differences of situation germane to the subject and calling for difference in treatment in order to justify discrimination in amount. Among beneficiaries whose circumstances are substantially the same there can be no just discrimination, for discrimination in such a situation would be merely arbitrary and capricious.

The twenty-sixth item of the will directs that all notes and obligations held by the testator at his death, upon which any beneficiary, or the husband, wife, or issue of any beneficiary, should be indebted or liable to the testator, if not collected before the division of the estate into parts, should, for the purpose of such division, be appraised at the full amount of principal and interest unpaid and owing at the time of the death, including all obligations barred by the statute of limitations, and requests that the trustees, in making division of the estate into parts, assign said obligations to the parts or shares, respectively, of such beneficiaries, and provides that, in case the share of a beneficiary is less than the indebtedness so assignable to such share, the excess of indebtedness shall constitute a portion of the estate and be distributed among the remaining shares, as the executors shall deem best, "it being my intention hereby to provide more fully for the equitable division of my estate into eighty-one shares or parts, so that no one of my said relatives, or the husband or wife or issue of any such relative who shall be benefited by my said will, shall obtain an advantage over any other person by reason of any advancement or assistance I may have, before my death, ren-

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dered to such relative or to the husband or wife or issue of the same, and which advancement or assistance shall be evidenced by any such unpaid note, bond, contract, agreement, or obligation unpaid and held by me at the time of my death."

It appears by the complaint that William A. Dickson, who, as one of the descendants of Marcia E. Dickson, is a beneficiary under the thirteenth item of the will (together with his children), was indebted to the deceased for borrowed money in a large sum, represented by promissory notes, and that Dickson obtained a discharge in bankruptcy January 8, 1900, prior to the death of the testator. The claim is now made that by reason of this discharge the debt of Dickson has been extinguished and cannot be considered as a debt or obligation to be assigned to and charged up against him and his children under the provisions of the twenty-sixth item. This question was submitted to the court by the eleventh interrogatory, and answered by the court to the contrary of said contention, and we think rightly. The intention of the testator under this item is very plain. He wished any unpaid loans or advancements made by him to any beneficiary to be computed as a part of his bequest to such beneficiary, or the husband, wife, or children of such beneficiary, whether outlawed or not. It is true that a discharge in bankruptcy not only bars the remedy, but operates to extinguish the obligation, if properly pleaded and proven; but it does not pay the debt nor relieve the debtor from his moral obligation, nor does it wholly extinguish the cause of action for all purposes. *Bank of Commerce v. Elliott,* 109 Wis. 648, 85 N. W. 417.

By the last clause of item 26 the intent of the testator is specifically declared to be to provide for an equitable distribution of his estate, so that no person shall obtain advantage of another by reason of any such advancement or assistance evidenced by a note or obligation *unpaid* and held by the testator at the time of his death. The debts of Dickson were unpaid, and the testator held the obligations therefor at the time of

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his death, so they come strictly within the words of the will. It is probable that the same result would be arrived at had there been no such clause. *In re Fussell's Estate* (Iowa) 105 N. W. 503.

By the answer to the twelfth question the court held that in assigning these notes and obligations they should be appraised at the full amount of the principal and interest unpaid thereon at the time of the testator's death, and this holding was plainly right under the terms of the will.

By the thirteenth question the court was asked whether the trustees were authorized to withhold from William A. Dickson and his descendants so much of the income and principal otherwise passing to them, from time to time, as would equal the full amount of principal and interest unpaid from time to time upon said Dickson's unpaid obligations held by the testator, and distribute the amount so withheld among the other beneficiaries under said item 13, and the court answered that they were so authorized in their discretion. This holding is complained of, but we think without cause. If such were not the holding, then manifestly the other descendants of Marcia E. Dickson would suffer, and the descendants of William A. Dickson would obtain an advantage over them in the distribution of the estate by reason of the indebtedness of their ancestor, a result which is contrary to the plainly expressed wish of the testator. Substantially the same questions were propounded (except as to the effect of a discharge in bankruptcy) as to the indebtedness of Charles G. Pratt and John M. W. Pratt, descendants of Hannah A. Pratt, who as such descendants were beneficiaries under the eleventh item of the will, and were answered in the same way. For the reasons given above these answers must also be held correct.

We now come to the question of the correctness of the allowances to the various guardians *ad litem* payable out of the estate at large, raised by the guardian of *Daniel Wells Norris*. The argument in favor of these allowances is, in substance,

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that the minors have been necessarily brought into court, not upon their own volition, but simply for the purpose of securing an authoritative and binding construction of the will for the benefit of the whole estate, and that the reasonable fees of their guardians, in performing their duty to their wards and to the court, are substantially a part of the necessary expenses of the administration of the estate. The case of *Ford v. Ford,* 88 Wis. 122, 59 N. W. 464, is relied upon to sustain the ruling of the trial court, and it is only fair to the trial court and to counsel to say that it does sustain the ruling. That case followed a series of cases brought for the construction of wills, and which are reviewed in the case of *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786, in which this court had, without serious examination of the question, directed that allowances be made by the county court out of the estate to the respective parties for counsel fees. In the *Donges Case* the question was brought sharply to the attention of the court, and it was held, after full consideration, that the habit of ordering the payment of counsel fees, other than the executor's, in such cases where the parties are *sui juris,* was without authority of law and should be stopped. Since the decision of that case this court has followed the rule there laid down, nor does the change in the law made by ch. 397, Laws of 1901, with reference to allowances for counsel fees in applications for probate of wills, affect actions for construction of wills. *Kronshage v. Varrell,* 127 Wis. 597, 107 N. W. 342. The *Donges Case,* however, was a case of actual adverse litigation by parties who were *sui juris,* and hence is not necessarily controlling upon the present situation, where minors have been brought into court by the executors simply as a necessary incident in the course of their effort to obtain direction as to their duties. The argument in favor of the allowance of reasonable pay for guardians *ad litem* in such a case, out of the body of the estate, especially where, as here, the interests of the minors are problematical and distant, is certainly quite

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persuasive. However, the question does not seem to be an open one. In *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439, which was originally an action to quiet title under a trust deed to which certain infants were necessary defendants (*Tyson v. Tyson,* 96 Wis. 59, 71 N. W. 94), it was distinctly held that, while an allowance should be made to the guardian *ad litem,* such allowance should be made payable only out of the infant's property under the control of the court, giving a lien thereon if necessary, following the rule laid down by New York authorities on that subject. *Union Ins. Co. v. Van Renssellaer,* 4 Paige, Ch. 85, and authorities cited at page 401 of 103 Wis. (79 N. W. 439). This rule having been definitely adopted, we do not deem it wise to change it. If hardship thereby results to a guardian who has acted under the order of the court, it must be accepted with the reflection that he has faithfully performed that which is in substance a public service, and has assisted the court in the administration of justice, as, by his high calling, he is at times bound to do, though there be no suitable financial return. We see no impropriety or error in remitting the question of the allowance to be made to the executors and trustees for services of their counsel to the county court, which has charge of the administration of the estate.

By the Court.—The judgment is modified by striking out the provision making the sums allowed to the guardians *ad litem* payable out of the trust estate at large, and inserting a provision that the sums allowed be paid out of and made a lien upon the respective interests in the estate to which said minors are entitled, and as so modified the judgment is affirmed, without costs to any party, except that the costs of printing of all the parties, and the fees of the clerk of this court, shall be taxed and paid out of the estate.

MARSHALL, J. (*dissenting in part*). I cannot agree that the secondary contingent beneficiaries under subdivisions 8 to

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14 of the will were intended to have no rights except as they might be recognized as distributees of the testator's bounty upon the happening of conditions mentioned permitting them to be such. My brethren hold that the will gives them no rights except to insist upon an honest exercise by the trustees of a discretionary power in trust to award benefits upon the subject of the trust being freed from the rights of the primary takers. In my judgment they are given definite rights dependent, as to enjoyment, upon the subject of the trust being so freed, and subject to a discretionary power in trust to diminish or deny such right altogether for good cause, as indicated in the fifteenth subdivision of the will. On one theory the trust power is to be exercised to give, no right vesting until its exercise. On the other, the gift vested in right by the will, the trust power to be exercised only to pay or to withhold. In the latter, upon a primary beneficiary being satisfied, the secondary beneficiaries are to take definite shares absolutely, unless the trustees for good cause determine otherwise. In the former, in such event, the secondary beneficiaries must wait upon the decision of the trustees awarding to them such portions as they may see fit. That is the theory of the court. It will be seen that there is a radical difference between these two. The result of adopting the wrong one is to make an entirely different will for Daniel Wells than he ever dreamed of making: a very serious mistake in any case, and most emphatically such in case of a vast property and great number of interests, as in the instance before us.

The all-important rule for the construction of a will is that its meaning must be determined from the instrument itself, viewed in the light of the circumstances under which it was made. If thus viewed it means one thing, it cannot be properly construed to mean another because of any written or other law. A will may be defeated by the written law, but cannot be contradicted or varied thereby. The will in question, though it deals in fact with real estate as well as person-

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alty, in legal effect deals only with the latter. It presents as clear a case of equitable conversion as can be found in the books. *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650, and many other cases in this court are conclusive on that point. Such being the case, no reason whatever is perceived for referring to any statute regarding the construction of wills relating to real estate. How does it read, having regard to the several interests; having settled that, we have settled all there is to be settled.

Another cardinal rule of construction is that, as between two meanings, either of which may be said to be expressed by the language used, the one should be regarded correct which under all the circumstances is the more reasonable. Now the most that can be said, it seems, in favor of the theory adopted by the court, is that it may reasonably be read out of the language of the will as well as the one for which I contend. Granted that is so, can there be any question but what the idea that Daniel Wells intended to dispose of all his property in definite shares to definite persons, with a power in trust to withhold as to any beneficiary found to be unworthy, is far more reasonable than the idea that he intended to turn his great property over to trustees to bestow, in a limited field, in their discretion? Can there be any doubt but what the idea that he intended to make a law, so to speak, and to create a power in trust to administer it, is more reasonable than the idea that he intended to create a power in trust to make the law of his estate and to administer it as well? It seems to me there can be but one answer, and that it is in the affirmative. Each of the items of the will, 8 to 14, and item 15, which bears on them all, are so long, so involved, and contain such useless repetitions and such a multiplication of words that one can best get sense out of them by first eliminating all except those which contain the real sense. I have endeavored to do that as to one taken as a type of 8 to 14, and as to item 15, transposed the declaratory purpose of the latter clause to its logical position, writing the two items in their proper relation,

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making a paragraph as to each idea and numbering or lettering the same for convenience of reference.

(1) "I direct my said trustees to hold shares 65 to 68 both inclusive in trust during the two lives and nineteen years" aforesaid, "for the benefit of Hannah A. Pratt and her lawful descendants."

(2) "I direct said trustees during the continuance of the trust to pay, quarterly, the net income" of said shares "to said Hannah A. Pratt" while living, otherwise to said "descendants, giving to each such portion as said trustees shall deem best."

(3) "Upon the termination of this trust I direct said trustees to pay whatever remains of said shares to said Hannah A. Pratt, if living," otherwise to said "descendants, in such portions to each as said trustees shall deem best."

(4) "I authorize said trustees during this trust to pay said Hannah A. Pratt" while living, otherwise to said "descendants, such portions of the principal as said trustees shall deem best, giving to each such portion as said trustees shall deem best."

(5) Said trustees "are authorized" during "this trust to pay said Hannah A. Pratt" while living, otherwise to said "descendants, the principal, giving to each such portion as said trustees shall deem best," said "trust to thereupon terminate."

(6) To save all "difficulty in construing the" foregoing *"I expressly direct that the" following "provisions are to govern in all cases" and all parts of the foregoing are "to be expressly subject to such changes* as my said trustees are authorized to make *under such provisions."*

(a) "In case any person otherwise ENTITLED TO ANY PORTION OF" SAID SHARES "shall, in the opinion of said trustees, not be either of good habits or of sufficient capacity to properly use or to take care of the portion *so coming to him or her* or shall not be likely for any reason whatever, in the opinion of said trustees, to properly make use of" such "portion, I direct" them *"to withhold the same and to pay such person only so much"* thereof "OTHERWISE COMING TO SUCH PERSON as said trustees shall deem advisable," or "in case said trustees shall deem it best themselves to expend the same or any portion for his or her benefit, then I authorize" them "to do so."

(b) "Whatever of my estate *shall be withheld from any-*

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one" for unworthiness "TO RECEIVE HIS OR HER PORTION and shall not have been expended for the benefit of" him or her *"shall be transferred as in case the person from whom it shall be withheld had been dead at the time" thereof.*

(c) "In case any person from whom *any portion of my estate shall have been withheld* shall have become worthy in the opinion of my said trustees TO RECEIVE HIS OR HER PORTION, then I direct that the fact that said trustees *withheld from such person a portion of my estate* shall not, thereafter, prevent such person from receiving HIS OR HER SHARE in any" subsequent "distribution."

(d) "The fact that any person shall have become worthy" as aforesaid "shall not entitle such person to receive any portion of my estate that shall have been withheld."

(7) "Except as provided," in clauses (a), (b), (c), (d), aforesaid, "and the ninth item of this will, I desire my said trustees in exercising the discretion" as to "paying and transferring to the descendants of any person mentioned any portion of my estate, to make such payments and transfers to the parent during his lifetime," in preference "to his issue," provided, however, "if said trustees" shall deem it best to prefer in any particular case the child to the exclusion of his living ancestor, they may so do.

(8) "In case of the death of one who would if living *have been entitled to any portion of my estate,* except otherwise provided I will that the lawful descendants of such person *shall take such portion by right of representation* subject to the aforesaid provisions to change and modify."

(9) "In case of the death of any *one for whom provision is made* herein and of all his lawful descendants prior to the time of his or their" right to the enjoyment of the portion of my estate that he or they would have received if living, and it is not otherwise provided herein, then I will, etc.

It would seem that one might safely forego effort to analyze the essential language of the will thus stripped of its useless verbiage, in order to discover the real intent of the testator. Does it not speak, for itself, plainly the purpose of the testator to, himself, bestow his bounty upon definite persons in definite shares, each to take under the will subject to a discretionary power in trust to vary the amount of the bounty

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according to circumstances, instead of a purpose to bestow the great property on trustees to, themselves, in their discretion, make gifts therefrom?

My brethren indulge in a very pretty figure at the point where it is said that to try to read out of the words, "giving to each such portion as my trustees shall deem best," any other than an absolute discretionary power to bestow benefits might well be likened to an attempt to "gild refined gold or paint the lily." With the greatest respect for my learned brothers, I venture to suggest that the rule was overlooked that the very plainest of language, when viewed by itself, may easily take on an ambiguous aspect when applied to the subject with which it deals or read with its context. "All is not gold that glitters." A thing is not a lily because it has the lily's form and color. Apparently refined gold, by the chemist's touch, may be made to disclose the fact that it is the merest dross. And so the beauty of form and color of the lily may be the lily in fact to the eye, while other senses will disclose it to be a delusion.

The words that seem to be so very plain are declared, as will be seen, by the testator himself to be open to construction. He *ex industria* omitted to leave the labor in that regard to be performed by others. He did it himself. He said, *"In order that there may be no difficulty in construing this will, I hereby direct that the foregoing provisions of this fifteenth item* [see a, b, c, d] *are to govern in all cases, and that all other provisions of this will . . . are expressly subject to such changes and modifications as my said trustees are authorized to make by this fifteenth item."* That plainly covers every thing appertaining to the discretionary power. Every part of item 15 is, in the very plainest of words, made a proviso to those which my brethren lay so great stress upon and seem only to view regardless thereof. To read items 8 to 14, omitting such proviso, may be likened to taking the glitter of fine gold as certainly indicating that which it suggests, omit-

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ting the handy test which may readily disclose its true character.

So at every step in administering the discretionary power created in general terms, precedent to item 15, the trustees are commanded not to look at such general terms alone, but to regard them in the light of the real purpose declared in the later item *"in order that there may be no difficulty in construing"* the same.

There is a very significant feature in items 8 to 14 which it seems my brethren have wholly overlooked, and which of itself indicates, quite plainly, that the testator intended to *give,* not to empower the trustees to *give.* In every instance where he provided, in such item, for a distribution of the corpus of his estate, the words "give to each such portion, etc.," are preceded by the words "pay and transfer." Do they not, quite plainly, indicate an intention to create a legal right coupled with an equitable interest as to a definite share of the estate for each secondary beneficiary and to vest the same contingently in him? "Pay and transfer" suggests, at once, a legal title in one, a real beneficiary right in another, and an act in contemplation necessary merely to combine the two; the act of paying or transferring. The words following, "giving to each such portion, etc.," therefore do not suggest an original bestowal but do indicate a contemplated transmission by the trustees of something precedently given by the testator.

Now turning to the testamentary, constructional, and specific directory clauses, we find in almost every period the plainest of indications that the testator intended to make his trustees a mere conduit for the passage of his property in definite shares to definite persons, and that immediately upon the taking effect of the will, legal and equitable rights should vest in the beneficiaries, and the legal title, coupled with a discretionary power in trust, not of disposition but of distribution, should vest in the trustees. Note these plain expressions: *"In case any person otherwise entitled to any portion*

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of" said shares; *"Take care of the portion so coming to him or her;" "To receive his or her portion;" "Shall not prevent such person from receiving his or her share."* Thus a definite portion was in contemplation as carved out and given a specific direction to a particular person, in the testator's mind, coupled with an absolute right to take and enjoy except as otherwise provided. Now comes in the discretionary power of the trustee, given in like unmistakable language, as note: *"To withhold the same and pay only so much thereof;" "Withheld from any person for unworthiness;" "Any portion shall have been withheld."* Do not "withhold" and "withheld" plainly suggest the existence of an absolute right to take a definite thing, unless withheld; that the power is to be exercised upon a thing in transit to stay its course toward a particular destination, not upon a thing to give it motion in that regard? Again, do not the words "pay only" indicate an obligation rather than a beneficence; that the mere element of beneficence was complete and fixed when the will took effect, giving rise to an obligation resting upon those upon whom the legal title devolved to pay, in discharge of an obligation, unless excused for cause, under the power in that regard? The trustees could not *withhold* anything unless the thing *withheld* would otherwise go in a particular direction, to a particular person, in discharge of a particular obligation created by a transfer to trustees for specific uses and an acceptance of the trust. They could not pay anything to anyone unless there was a person holding an obligation, waiting to be discharged by such payment.

Look at period (c). The share of each person is there treated as a definite thing to be considered by itself at each distribution, entitling the one holding the vested contingent right thereto to a ratable part of that portion of the whole estate distributed, such part to be charged to such share unless withheld, in which case the ratable portion to be charged to such share just the same, but deemed to be absolutely for-

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feited as to the holder of the contingent right and to be a subject for distribution under other clauses of the will, the balance of such share, however, to be regarded as such person's property in all future distributions, subject to the further exercise of the discretionary power to withhold and divert. How could that be possible other than under the construction of the will for which I contend? How could one forfeit a thing which he never possessed a vested right to, contingent or otherwise?

Now look at paragraph (8). There the share carved out for a person, who may predecease its distribution, is still to be regarded as having been his in right, and to go accordingly, to his descendants by right of representation. That is only consistent with the existence of a vested right in such person, springing from the act of the testator and the allowance of his will. It is wholly inconsistent, it seems, with the idea of a mere privilege to take the crumbs that may perchance fall from the table of the trustees.

At last, in paragraph (9), we find the idea still strikingly prominent, that a definite part of the testator's property was willed to each of those whom he remembered, with a right vested accordingly, subject to variance for cause—in that the part designed for one, in case of his demise and that of all of his descendants as well before arrival of the time for the trustees to discharge the contingent obligation "to pay," is to go over in a specific manner, to specified persons.

Thus every major and minor part of the estate the testator intended should be vested in right, by force of the will itself, subject to disturbance for cause as to anyone appearing in the judgment of the trustees unworthy to enjoy the "portion so coming to him or her."

Does it not seem plain that the words "giving to each such portion as said trustees shall deem best" were written with reference to the words preceding, *"pay and transfer,"* and with strict regard to the directions to treat the estate as divided into as many major and minor shares as there were per-

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sons intended to be remembered, and in discharging the obligation to pay each his part, to consider his habits, his capacity, and everything whatsoever affecting his worthiness to enjoy the benefaction held contingently in trust for him and to diminish the same, or withhold it altogether according to the result. That makes a reasonable disposition of the great property which Daniel Wells possessed, while the other theory convicts the distinguished business man of having made such a disposition of his great estate as no one in his right mind and in the strength of his manhood would be expected to make.

Much stress is put on the fact that the words "give to each such portion, etc.," were repeated many times in items 8 to 14 of the will, without any reference therein or in close connection therewith, to item 15. We cannot appreciate that. What difference, pray, does it make, as regards the effect of item 15 upon the precedent items, whether the latter is referred to in the former, or the former in the latter, if in fact, as we find it to be, every part of the will is expressly made subject to item 15, required to be read therewith and to be construed and governed thereby?

We are told that item 15 itself recognizes a discretion different from that to withhold because of unworthiness to take, in that it says, excepting "in case of unworthiness or incapacity, and except as to bequests in the ninth item, the trustees are directed, 'in exercising the discretion given to them by this will,' to prefer living parents to their children. Here a discretion is spoken of and recognized by the testator which is distinct from the discretion conferred by item 15." We confess inability to appreciate that. All parts of item 15 expressly refer to and govern, as before indicated, items 8 to 14, inclusive. Those portions of 15 which we have designated as (a), (b), (c), (d) relate to variances, of the otherwise certain rights, in case of unworthiness. Period 8, to which the court refers, relates solely to that part of the precedent clauses, 8 to 14, relating to payment and transfer of portions of the corpus of the estate. In those cases the trustees are

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given authority, for good cause, in their judgment, to prefer a descendant in the second to a descendant in the first degree. That, as well as all other parts of item 15, are in harmony with the idea that each beneficiary is to take under the will without any act of the trustees, except that of mere payors or transferrers, unless for cause they conclude to diminish or deny the right, which they are given full power to do acting judiciously.

In closing we must again refer to the plain declaration of the testator that the words, "giving to each such portion as my trustees may deem best," are not to be taken literally, but are to be taken according to the testator's construction thereof, and directions in regard thereto. Facing that, we are able to reach—we are forced to—a different conclusion than the one arrived at by the court—without attempting the impossible feat suggested in the court's opinion—because the testator in plain language, "in order that there might be no difficulty in construing" his will, *ex industria* construed it himself, for all whom it might concern.

Except as to the one feature we have discussed we fully concur in the decision of the court. As to that feature it is hoped that we have made our dissent as emphatic as practicable.

Motions for a rehearing and for amendment of the mandate were made, and on May 8, 1906, the following opinion was filed:

WINSLOW, J. In the opinion of the court the following language is used: "While it is probable that the property disposed of under this will should be considered as personal property under the rule of equitable conversion," etc. The plaintiffs, on motion for rehearing, call attention to the fact that the question of equitable conversion was not raised or argued in the case, and hence should not be decided. Their contention in this behalf is well founded. The words above

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quoted were inadvertently used. The idea intended was that, "even if the property disposed of should be considered as personal property under the rule of equitable conversion," etc., and the opinion should be read as if these last-named words were used. The question of equitable conversion was not decided, nor was any intimation of opinion upon that question intended.

Motions for rehearing and for amendment of the mandate are made by several of the guardians *ad litem* so as to provide for the allowance to them of costs or compensation for their services in this court, or both. Upon consideration of these motions we are satisfied that allowances for services upon the appeals should be made to the guardians who appeared in this court, payable from and made a lien upon the interests of their respective wards. The mandate will therefore be amended so as to provide for such compensation, and in other respects the various motions are denied, without costs.

By the Court.—The mandate is amended so as to read as follows: The judgment is modified by striking out the provision making the sums allowed to the guardians *ad litem* payable out of the trust estate at large, and inserting a provision that the sums allowed be paid out of and made a lien upon the respective interests in the estate to which said minors are entitled, and as so modified the judgment is affirmed, without costs to any party, except that the costs of printing of all parties and the fees of the clerk of this court shall be taxed and paid out of the estate; and it is further adjudged that an additional allowance of $200 be and is hereby made to each guardian *ad litem* as compensation for his services in this court, to be paid out of and made a lien upon the interest of his respective ward or wards.

On June 21, 1906, a further motion to amend the mandate was granted to the extent of allowing Glenway Maxon $500 instead of the amount stated in the mandate, and $200 additional to each of the other guardians *ad litem*.

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RITTER, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 1—May 8, 1906.

Appeal: Refusal to set aside verdict, when disturbed: Railroads: Negligence: Injury to person at street crossing.

1. **Where the trial court has refused to set aside a verdict as contrary to the evidence, that decision will not be disturbed on appeal unless the verdict is against the great weight of the evidence and all the reasonable probabilities.**
2. **The evidence in this case (stated in the opinion) is *held* to permit the inferences that plaintiff—then a boy about six years old—was struck by an engine at a street crossing through defendant's negligence, and that such negligence was the proximate cause of his injury.**

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to recover damages for a personal injury which plaintiff alleges was caused by defendant's negligence. It is alleged that plaintiff was injured on November 14, 1888, on a street crossing in the city of La Crosse over which defendant maintained several railroad tracks on its right of way. Plaintiff was about five years and eight months of age when he was injured. He commenced this action in March, 1904. It was shown that defendant maintained seven tracks over the crossing of Avon street, running north and south, and Hagar street, running east and west, in this city; that plaintiff was seriously injured by a car or engine attached to one or more cars passing over such crossing. It is claimed that the defendant was negligent in giving no warning before crossing the street, by the blowing of a whistle or the ringing of a bell, and in running the engine and cars faster than six miles per hour. The jury to whom the case was submitted rendered a verdict for the plaintiff and awarded him the sum of $8,700 as damages. Judgment was rendered by the court in his favor for this sum. This is an appeal from such judgment.

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For the appellant there was a brief by *H. H. Field* and *Woodward & Lee,* attorneys, and *Chas. E. Vroman,* of counsel, and oral argument by *Mr. Vroman.*

For the respondent there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

The following opinion was filed March 20, 1906:

SIEBECKER, J. It is contended that the verdict of the jury is without credible evidence to support it, and that the court's denial of defendant's motion for a new trial upon this ground was prejudicial error. The rule governing this court in its review of such a decision by the trial court is explicitly stated in the recent case of *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666, to be that "this court will not reverse such order merely because, in its opinion, the verdict is against the preponderance or 'great weight' of the evidence; the deference which the court owes to the trial courts forbids such action. This court will reverse such a ruling only when there is no evidence to sustain the verdict or its finding, or where, though there be some evidence in its support, still the great weight of the evidence is against it, *and* that weight is so reenforced by all the reasonable probabilities and inferences that it becomes overwhelming. . . . The great weight of evidence and all reasonable probabilities must conjoin against the verdict in order to make the situation such that this court will interfere." *Collins v. Janesville,* 117 Wis. 415, 94 N. W. 309; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57.

The question, then, is whether there is evidence tending to support plaintiff's claims, which in any reasonable view of it is worthy of belief. As stated, the accident occurred about sixteen years before the trial took place. This fact may serve to explain the want of recollection, by the witnesses of the accident who were sworn on the trial, of many of the par-

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ticulars. It, however, affords no aid to explain discrepancies and contradictions between them as to matters of which they claim to have positive recollections. There is nothing in the location of the tracks, the adjacent structures, or other objects surrounding the place of accident which could prevent the witnesses from observing the occurrences and incidents of the accident to the extent to which they now testify they did see them. The testimony relied on to support the verdict is mainly that of Mr. Smith, Mrs. Smith, and Mr. Clark. They state that this engine was being moved, rear end forward, over this crossing, in a westerly direction. Mr. Smith testifies that the accident occurred between the hours of 9 and 10 o'clock in the forenoon; that his working hours as night watchman ended in the morning; and that he stood near the gate in the dooryard of his home when the accident happened. He had a clear and unobstructed view of the tracks and the crossing, these being from 270 to 300 feet from him. While looking toward and at the crossing he saw two or three boys at the crossing, near the sidewalk, on or next to the tracks. He states that they stopped and one of them hopped or danced on one foot; the engine then came up to them, and his view of the boys was then intercepted. He, however, immediately noticed that something had gone wrong and at once went hurriedly to the place of the accident. When he came up to the boy he found that he had been injured. No warning or signal was given by whistling or ringing the bell, and the engine and car moved on without stopping. Mr. Smith also states that, at the time of the accident, the engine was running faster than six miles an hour. He examined the tracks immediately after the plaintiff had been taken to his home, which was situated near the tracks, and found two shoe prints and a little blood on the south rail of the second track from the south.

Mrs. Smith testified that she and Mr. Smith were standing at their gate. Her statements are confirmatory of Mr. Smith's

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as to the time of day when the accident happened, the backing of the engine and car and their speed, as to there being some screaming and noise at the crossing, and his starting for the scene of trouble. She states, however, that she saw no boys on the crossing before the accident. Mr. Clark testified that he passed the crossing and observed a boy as he passed onto the tracks; that he spoke to him, saying it was not a safe place for him. He states that there was no other boy with the plaintiff. He walked on nearly to the end of the next block when he heard some screaming and commotion at the crossing, and he turned and observed a person in the act of picking up something. He saw an engine and cars going westward, but did not return to learn what had occurred.

The question arises whether this evidence furnishes a basis which will support the inferences of liability upon the grounds found by the jury. There is nothing to show that this evidence is intrinsically improbable, and it cannot be said that the great weight of the evidence in the case and all the reasonable probabilities and inferences are so clearly against the findings of the jury as to overcome them by an overwhelming weight. This evidence, above adverted to, manifestly permitted the inferences that the boy was struck by the engine on the crossing through appellant's negligence, and that such negligence was the proximate cause of plaintiff's injury. Under such circumstances the trial court is fully sustained in its decision denying defendant's motion for a new trial. The rule governing this court in its review of such a decision of the trial court was reiterated in the case of *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57, by declaring that upon such a motion "the trial court enters a field of discretion in which he may consider whether there is such overwhelming preponderance of evidence against the verdict that it ought not to stand. While this discretion must be exercised judicially, and may be so clearly abused as to warrant reversal by this court, that will be done only in most extreme cases, of

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which but few have ever arisen. The superior opportunity of the trial court to understand the meaning of the witnesses must always give to his decision on such a motion great weight."

We are led to the conclusion that the record presents no ground calling for reversal of the judgment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied May 8, 1906.

CONNOR and others, Respondents, vs. CITY OF MARSHFIELD and others, imp., Appellants.

March 23—May 8, 1906.

Municipal corporations: Purchase of water and lighting plant: Equity of redemption: Submission to popular vote: Statutes construed: Bonds of vendor corporation, when not a municipal indebtedness: Constitutional limitation: Hydrant rentals: Contract for benefit of third person: Reasonableness of purchase: Subsequent deed to third person subject to city's rights: Validity.

1. Sec. 959—51, Stats. 1898 (sec. 4, ch. 361, Laws of 1897), confers upon a city or village a new and specific authority in a particular case, independent of the power granted in sec. 927—1, *i. e.* the authority to acquire an equity of redemption in a system of waterworks or lighting without becoming liable upon the existing mortgage indebtedness secured upon the plant; and in the absence of any bond issue it is not necessary to submit to a popular vote the question of making a purchase under sec. 959—51, Stats. 1898.
2. The act of 1897, when incorporated into the Revision as sec. 959—51, continued unchanged in meaning.
3. A written contract between a city and a water and lighting corporation required a transfer by the corporation of all its property to the city, subject to a certain mortgage, and payment of a price by the city to the corporation. The property was actually delivered and surrendered by the corporate officers to the posses-

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sion and management of the city officers and employees. *Held*, that the transaction constituted a purchase by the city of the equity of redemption in the property of the corporation under sec. 959—51, Stats. 1898, and that the transfer (provided for in the contract) to the city of the corporate stock and unissued bonds of the corporation was not a purchase of either to acquire control of the corporation as contemplated by sec. 927—1, but was merely a method of securing their cancellation.

4. A city purchased a water and lighting plant subject to a mortgage thereon securing bonds issued by the vendor corporation. It did not assume payment of said bonds. Sec. 959—51, Stats. 1898, authorizing purchase of such an equity of redemption, provides that such purchase shall not create any liability on the part of the city to pay bonds so issued "nor shall the amount of such bonds and mortgage . . . be deemed to be an indebtedness" of the city. *Held*, that such bonds are not an indebtedness of the city within the meaning of the constitutional limitation upon municipal indebtedness.

5. Prior to the purchase of the plant the city had contracted with the corporation to pay certain hydrant rentals and, in case the corporation should at any time issue mortgage bonds, to pay directly to the trustee in the mortgage so much of said rentals, when and as they became due, as would discharge the interest on the bonds as it should mature, and to continue such payments so long as said interest should remain due and unpaid. *Held*, that this agreement, being merely a promise to pay for prospective services as they should be performed, did not constitute an indebtedness until such performance; and that the city did not by the purchase of the plant assume any new obligation to the bondholders in respect thereto.

[6. Whether the doctrine that a promise by one, upon good consideration from another, to pay money to a third is irrevocable and impossible of change by the original parties, is applicable to contracts wholly executory upon both sides, not determined.]

7. A finding by the trial court that the purchase by a city for $25,400 of the equity of redemption in a waterworks and lighting plant mortgaged for $125,000, was not, under all the circumstances, an unreasonable and improvident exercise of power, is *held* to be sustained by the evidence.

8. The very broad discretion over questions of policy which is vested in municipal governments will not, under ordinary circumstances, be interfered with by the courts.

9. After contracting to sell to the city the equity of redemption in a water and lighting plant, the vendor corporation gave to a third

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person a warranty deed of all the plant, franchises, etc., subject to rights of the city as purchaser. *Held* that, as the corporation had already, by the sale to the city, become relieved from the duties imposed by its original franchise, the transfer of its mere legal title by such warranty was not contrary to public policy.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Since 1892 or 1893 the defendant *Marshfield Water, Electric Light & Power Company,* hereinafter called the "Company," has maintained in the city of *Marshfield* waterworks and lighting plant under an ordinance, contract, or franchise which provided, among other things, for the payment of hydrant rental in the sum of at least $4,000 per annum, which, at the date of the transactions hereinafter referred to, had been increased by additions to $5,080. The city was also buying light, although not required to do so by contract, in the sum of about $4,000. The ordinance further reserved privilege of purchase by the city by appraisal at certain stated intervals. The company had issued $100,000 of capital stock, most of which was owned by *William H. Upham.* It had mortgaged its plant, franchises, and all rights in the sum of $150,000 to secure bonds, of which $125,000 were outstanding and $25,000 authorized to be issued and countersigned by the trustee, but still in the corporate treasury. In this situation, about December, 1903, negotiations commenced between *Mr. Upham,* who controlled the company and was able to speak for it, and the city, for acquisition by the latter of either the property or the stock. He made certain proposals looking to the transfer of the stock and property to the city, which took advice of counsel as to whether or not it could make purchase, and was advised that under the provisions of sec. 959—51, Stats. 1898, it was empowered to make a purchase of the equity of redemption without submitting the question to a vote of the people. This was followed by expert examination of the property by persons employed by the city for that purpose.

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Whereupon, on March 1, 1904, a committee appointed on the subject reported the result of such investigation and their opinion that it would be to the best interest of the city "to own the plant and franchises now held by the [company], and would recommend the purchase at this time at $25,400 for their interest subject to $125,000 of bonds held in the East." Thereupon a resolution was duly adopted authorizing the making of a land contract, a draft of which was before the council, and which ran from the company to the city and provided for the payment by the latter of $25,400, of which $400 was to be paid down and $5,000 at the end of each year thereafter, with six per cent. interest, "to apply when fully completed on the purchase money of the following tract, piece, or parcel of land and personal property situated in the county of Wood and state of Wisconsin." Then follows a description of the entire property of the company, and "also all the $100,000 of capital stock of the said party of the first part, which said stock is to be transferred as follows: [To three designated city officials]—in trust, nevertheless, for the use and benefit of the said city of *Marshfield;*" said property to be transferred "free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the said party of the second part, and except the mortgage of $150,000."

Thereupon the possession of the works was turned over to the city, which works were operated by a commission appointed for that purpose. The stock was assigned according to said contract and the $25,000 of unissued bonds placed in escrow with the defendant Reese, to whom the company made a warranty deed of the property upon his agreement to carry out the land contract with the city. The company thereupon, at directors' meeting, passed a resolution distributing its assets among its stockholders, by virtue of which the money paid by the city was turned over to *Mr. Upham,* who had manual possession of all the stock at the time of the transaction, and who

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had delivered it to the city officials. No steps were ever taken by the city to maintain the corporate organization.

After this transfer was complete the plaintiffs, as taxpayers, on behalf of themselves and others similarly situated, commenced this action seeking judgment annulling said land contract and the transfer of the stock, and enjoining the city from making any payments thereon, or from making any payment on the principal or interest of the bonds of the company, and for the return to the city by *William H. Upham* of the $400 cash payment which he had received, and from the company $800 which had been paid in addition for extras, and generally canceling all that had been done. The trial court found substantially the foregoing transactions; that *Marshfield* was a city of the fourth class having about 7,000 inhabitants and existing under the general charter; made certain findings as to the cost and that the fair value of the physical property and franchises belonging to the company at the time of the contract was $100,000; that in view of all the circumstances the purchase was not an unreasonable exercise of power on the part of the city officers. It is conceded to be a fact that the city's indebtedness other than that resulting from this contract was at least $26,000 below its constitutional debt limit. No question in connection with the transaction was submitted to a vote of the people. The court held the whole transaction void on this ground, without deciding other legal questions, and rendered judgment annulling the whole transaction and re-establishing the parties in their original *status quo* by the surrender of all that the city had received and payment by it of the result of an accounting pending its possession and operation of the works, of which in detail no complaint is made. From this judgment the defendants city, company, *William H. Upham,* and certain others appeal.

For the appellants there were briefs signed by *C. B. Edwards* and *George L. Williams,* attorneys for the city of *Marshfield* and others; by *W. A. & E. C. Pors* and *George*

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Lines, attorneys for *W. H. Upham;* by *Quarles, Spence & Quarles,* attorneys for the *Marshfield Water, Electric Light & Power Company;* and by *George L. Williams* and *George Lines,* of counsel; and the cause was argued orally by *Mr. Lines* and *Mr. Edwards.*

For the respondents there was a brief by *Goggins & Brazeau,* and oral argument by *B. R. Goggins.*

DODGE, J. 1. The first field of discussion by counsel is that of the apparently overlapping provisions of various statutes dealing with the construction or purchase of waterworks and lighting plants by cities, which, it must be confessed, approximate closely to the chaotic condition of those regulating the issue of bonds, commented on in *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 93 N. W. 262. One principally debated question in this connection is as to the degree in which sections 927—1 and 959—51, Stats. 1898, affect or control each other. Sec. 927—1 is substantially, with some slight modifications, a perpetuation of ch. 325, Laws of 1882, ch. 165, Laws of 1883, and ch. 182, Laws of 1895. After providing for process of condemnation in aid of acquiring waterworks and lighting plants, it provides that:

"Any [such] city or village, when authorized so to do by ordinance adopted by a vote of a majority of all the members of its common council or board of trustees, after such ordinance has been submitted to a vote of the people and a majority have voted in favor thereof, may purchase or lease the waterworks or lighting works, or both, owned by any corporation in such city or village and having a contract therewith for public service, or purchase or lease the interest of such corporation in such works, or obtain the control of such works by purchasing the stock of such corporation and keeping up its organization."

Such law, in addition to any general authority that may have otherwise existed in municipalities, authorized a method of performing the municipal function to provide for protection

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against fire and for street lighting, and doubtless subjected that method to the prescribed restrictions and procedure. The legislature, in Laws of 1897, by ch. 361, made certain other provisions in regulation of the obtaining of water and light for cities. The first three sections are in the way of relieving cities and villages from certain then existing limitations upon their power to raise money to pay for water and light supplied by private companies. But the fourth section, now sec. 959—51, provided:

"In all cases where any system of waterworks or lighting has been or may hereafter be constructed in any city or village by any person or corporation and such person or corporation shall have heretofore executed or shall hereafter execute any bond or bonds and secure the payment of the same by a mortgage upon or trust deed of such system of waterworks or lighting, such city or village may purchase of such person or corporation all of the interest and equity of redemption of such person or corporation in such system of waterworks or lighting, or both, and take possession thereof and operate the same. If it shall be necessary or desirable for such city or village, in making such purchase, to issue bonds, the proposition for the purchase of such interest and equity of redemption and the issuing of such bonds shall be submitted to the electors at a special election to be called for that purpose. . . . The purchase by any city or village of the interest and equity of redemption of any person or corporation in any system of waterworks or lighting, as above provided, shall not create any liability on the part of such city or village to pay, satisfy or discharge any bonds issued or any mortgage or trust deed upon such system of waterworks or lighting executed prior to the purchase of such interest and equity of redemption by such city or village, nor shall the amount of such bonds and mortgage or trust deed or any portion thereof be or be deemed to be an indebtedness of or a liability against such city or village."

It will be observed that, while the procedure authorized and regulated by sec. 927—1 is limited to cases where there is an existing service contract between the city and the company, in

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other respects it deals generally with any method of acquisition of existing water and light works, whether of the whole title or of the interest of the corporation therein, whether by purchase or leasing, or by taking control and operation of the corporation by purchase of its stock, thus not transferring the plant to the city at all. On the other hand, sec. 959—51 is confined to the one transaction of purchase, and purchase only of an equity of redemption subject to an existing mortgage upon the premises, and, we think, must be considered the more specific of the two. After careful consideration of these statutes we have reached the conclusion, hardly to be aided by statement either of the general rules of law governing statutory construction or of the details of the comparison which have weighed with us, that the act of 1897 was intended to confer a new and independent authority upon the city in a particular case; perhaps not merely authority to purchase an equity of redemption in a plant, for that may have existed before, but to acquire an equity of redemption without becoming liable upon the existing mortgage indebtedness secured upon the plant. Both statutes are permissive in form: the one permits a purchase by one method of procedure, the later permits one of the same acts to be done by another, and neither contains any prohibition, in terms, against the procedure authorized by the other; hence, strictly speaking, there is no necessary conflict in the two enactments thus permitting alternative methods of accomplishing the same result unless, indeed, legislative intention be apparent that the later and more specific statute shall exclusively control the situation it describes. The position seems to us closely analogous to that stated with reference to ch. 348, Laws of 1899, in *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 374, 93 N. W. 262, 266, and we think it was the plain intent of the legislature that this particular act authorized in 1897 might be done upon compliance with only such regulations and restrictions as were prescribed in that statute. In this view we cannot escape the conclusion

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that the provision that the making of the contract of purchase and the issue of bonds must be submitted to popular vote only in case it is necessary to issue bonds in making such purchase clearly excludes any legislative intention that such submission is to be necessary in the absence of any bond issue. Nor can we doubt that the act of 1897, when incorporated in the Revision as sec. 959—51, continued unchanged in meaning. As a result, we must disagree with the trial court, and hold that the contract is not void for want of such popular vote if it was a mere purchase of the equity of redemption in the company's plant and property as authorized by sec. 959—51.

2. The next question in order, therefore, is whether the transaction here criticised was such a purchase. The respondents vehemently contend that it was a purchase of the capital stock of the corporation, authorized only by sec. 927—1, and controlled, therefore, by the condition in that section for submission to popular vote. Of course, the fact that the city did receive, in form, transfer of all the stock of the corporation lends color to this contention, but the act of the city, being governmental, is entitled to at least a *prima facie* presumption that its officers were intending to act legally and within their powers. It must also be assumed, as has so often been said with reference to statutes regulating town and county procedure, that mere matter of form or irregularity need not obscure or defeat a good-faith attempt to do something which is authorized and which these public officers, in the exercise of the duty delegated to them, deemed to be for the welfare of the community. It is true that the preliminary negotiations were with *Mr. Upham,* who seems to have controlled, though perhaps not owned, all of the stock, and contemplated purchase of his interest; but preliminary negotiations are in no wise conclusive as to the terms of a contract; indeed, they are not admissible, unless there be such ambiguity in the contract as to necessitate the consideration of the circumstances surrounding it in order to ascertain the intention of the parties.

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The recommendation of the committee, upon which the final action by the council was taken, was for the purchase of the property subject to the incumbrances thereon; in other words, the equity of redemption. This would seem to indicate a departure from the conception which the parties had in the earlier negotiations, due, perhaps, to the fact that the city had obtained advice of counsel that they had no power to acquire the control of the corporation by purchase of stock without a vote of the people, nor, perhaps, without making the bonds of such corporation an additional municipal debt. The final action of the council was a resolution to make a certain written contract then present before it. That contract required, primarily, a transfer of all the property of the corporation by the corporation and for a price to be paid to the corporation. All this is inconsistent, of course, radically, with the transaction mentioned in sec. 927—1 of the city's taking control of the corporation by buying its stock, or, apparently, indeed a mere controlling majority thereof from the stockholders, thus leaving the plant itself still the property of the corporation. The conduct of all the parties was equally inconsistent with that view. The property itself was delivered over and surrendered by those who were the corporate officers and employees to the possession and management of city officers and employees chosen by the city government as such, and not at all through the medium of corporate action as would have been the method under a stock purchase as authorized by sec. 927—1. Other clauses of the contract are also inconsistent with the conception of a continued ownership of the plant by the corporation, such, for example, that until completed payment the city should pay the taxes, and should hold the premises as tenant at sufferance of the corporation; also, that the city should pay the operating expenses incurred by the company subsequent to March 1, 1904, which would be absurd if the corporation were to continue in the control and management, even though such corporation were to be dominated by representatives of

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the city as stockholders. There is in this contract still another element entirely inconsistent with the idea that the city was to obtain ownership of the corporation by the transfer of the stock, for in that case the ostensible payment of $25,400 would be merely fictitious. The agreement is that it should be paid to the corporation, but what belongs to the corporation belongs equitably to its stockholders. Hence, the moment the city paid into the treasury of the corporation this money, it would have been under the control of the city as the holder of all the stock, and, in practical effect, would be payment by the city to itself. This, of course, was not the contemplation of the parties, but, on the contrary, they understood and acted upon the idea that this money, going to the corporation, for its property, was subject to distribution among its former stockholders, although they had, in form, completely divested themselves of their stock by assignment to the city. Reason enough can be found for insistence by the city that the evidences of all the outstanding stock should be delivered over to it, for there might be serious question whether a board of directors, or even the stockholders in meeting, could, against the wish of any one of them, dispose of all the corporate property in such a way as to put it out of business and disable it from performing its corporate function and duty. It is a very reasonable precaution that any peril of criticism or attack should be forestalled and excluded by requiring the corporation to procure from all its stockholders a delivery of their stock as an evidence of their assent to the transaction, and as a method of canceling all the corporate liabilities except the mortgage bonds, to more perfectly assure the title to the property acquired by the city.

After weighing all these considerations, we cannot avoid the conviction that the contract in fact made was for purchase of the equity of redemption in the property of the corporation, and that the transfer of the corporate stock and unissued bonds was not a purchase of either to acquire control of the

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corporation as contemplated by sec. 927—1, but merely a method of securing their cancellation; hence, that the transaction was such as sec. 959—51 authorizes without submission to popular vote.

The respondents present several other theories upon which it is claimed the judgment should be affirmed even though it be determined that submission to popular vote was not required. Among these are the propositions that by the transaction the city becomes indebted beyond its constitutional limit of five per cent.: First, because the $125,000 outstanding bonds of the water company must be considered indebtedness; and, secondly, that by the purchase the city becomes obligated to the bondholders absolutely for at least $72,000 by reason of a provision in the ordinance contract with the water company that in case the company should at any time issue mortgage bonds the city would pay so much of the hydrant rentals as will discharge the interest upon such bonds as it may mature from time to time, direct to the trustees when and as such rentals are payable by the city, and that such payments shall be made so long as the interest on such bonds shall remain due and unpaid. It seems to be conceded by the appellants that the five per cent. limit would be exceeded if either $125,000 or $72,000 of indebtedness is incurred by this contract.

3. The contention that, by purchasing this plant subject to the mortgage thereon securing payment of the $125,000 of the company's bonds, the ultimate payment of them by the city has become so unavoidable that for all practical purposes it is bound to pay them and must be held indebted for their amount, so as to infringe the constitutional prohibition against becoming indebted to an amount more than five per cent. of the assessed value of taxable property, is not without very persuasive authority, if the question can be considered an open one in this court. We do not think it can, however. In the Milwaukee park-land cases (*Perrigo v. Milwaukee,* 92 Wis. 236, 65 N. W. 1025; *Milwaukee v. Milwaukee Co.* 95 Wis. 424,

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69 N. W. 819, and *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018) this court fully considered whether, when a city purchased property, or acquired the right to purchase it, from the fact that rights in or burdens upon that property were held by others, so that the city, to hold it and protect the interest acquired in it, must pay large sums of money, the city thereby became indebted for such sums in the constitutional sense. We reviewed the conflicting array of decisions, and, rejecting the reasoning of those the respondents now cite, we decided the question in the negative. The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditor of its grantor into applying to his claim either its general revenue or property owned by it at the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own. This distinction between conferring upon another power to take, *in invitum,* either general municipal revenue or property owned by the city prior to the contract, and a right merely to retake the property which is acquired by the contract or the earnings or proceeds thereof, is sustained in many decided cases, of which the following are illustrative: *Kelly v. Minneapolis,* 63 Minn. 125, 131, 65 N. W. 115; *Windsor v. Des Moines,* 110 Iowa, 175, 182, 81 N. W. 476; *Joliet v. Alexander,* 194 Ill. 457, 464, 62 N. E. 861; *Winston v. Spokane,* 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle,* 19 Wash. 320, 53 Pac. 365; *State ex rel. Port Townsend v. Clausen* (Wash.) 82 Pac. 187.

We can discover no valid distinction between the park-land cases and the present situation. In both the legislature had, to the extent of its power, authorized the transactions, had declared that the city should be under no legal liability, and that the burden on the property should not be deemed indebtedness within the constitutional limitation. Under no circumstances could the holders of these bonds recover any money judgment against the city for their principal. Nor is any

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property formerly owned by the city subjected to seizure by the bondholders. True, by enforcing their right to take away the water and lighting plant they may deprive the city of so much of its money as up to that time has been paid upon the purchase, but the same was true as to the park lands. We cannot, without repudiation of principles now established in our jurisprudence, hold the amount of these bonds to have become indebtedness of the city within the constitutional inhibition.

4. As to the hydrant rentals, respondents concede that this court has adopted the doctrine that a promise to pay for prospective services as they are performed, or instalments of interest for future forbearance of money, does not constitute any indebtedness until each instalment becomes due, and has repudiated the contrary view, in support of which, nevertheless, they cite numerous cases. That such concession is well justified we cannot doubt, nor are we at all inclined to question or re-examine the arguments deliberately approved in *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57, and *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113. But, argue counsel, though we adhere to those decisions, the situation here is changed by the fact that the city had agreed to pay these hydrant rentals to a third person, to wit, the trustee in the mortgage, and could not by any act of the company be released from such obligation, and that by purchasing the works and thus, by complicity between the company and city, disabling the former from earning such rentals, the city became bound not only to pay such rentals as should be earned, but also, equitably at least, to see to it that enough are earned by the plant to pay the interest on the bonds, which amounts to an absolute promise to pay the money. Counsel for appellants argue with much force that the doctrine of several of the state courts and the federal courts, adopted in *Enos v. Sanger,* 96 Wis. 150, 70 N. W. 1069, and *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, that a promise by

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one upon a good consideration from another to pay money to a third is, from the moment it is made, irrevocable and impossible of change by the original parties, has no application to contracts wholly executory on both sides, for there no consideration moves to the promisor until the promisee performs his part of the contract, and, since it is always in the power of the promisee, by breaching the contract on his part, to prevent any obligation ever to arise on the part of the promisor, no right is conferred on the beneficiary third person until the promisee does perform and thus supply the consideration essential to impose a duty on the promisor under the rule of the cases above referred to. Also, that there can be no objection to doing by consent of both that which one can do of his own will. We shall not deem it necessary to decide upon this contention, for another more directly brings us to the same conclusion as to the effect of the transactions here presented. Clearly that the hydrant rentals, or part of them, were to be paid to a third person did not render inapplicable the reasoning of the *Berlin* and *Oconto Cases*. The rentals were to be paid only as the service should be rendered. The consideration for each instalment was the performance of the service, not the company's promise to perform it, and the city did not become indebted in the constitutional sense until such performance. So by the original ordinance-contract, and until the purchase of the works, the prospective obligation for hydrant rentals was not indebtedness. No argument advanced, or which occurs to us, serves to show any new obligation assumed by that purchase. Nowhere in the contract is there any agreement by the city to pay interest or to so operate the plant as to earn hydrant rentals, any more than there is an agreement to pay the principal of the bonds. True, the property is subject to the right of the bondholders to collect from it their interest, but only to the same extent as their principal; but it is just this kind of a burden which the statute permits to exist without constituting any general liability of the city capable of be-

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ing enforced by the creditors of the company against either the general property or the general revenues; hence not indebtedness such as the constitution prohibits in excess of five per cent.

5. A further ground on which it is contended the judgment should be sustained is because the contract is so unreasonable and improvident that it must be held void. With reference to this subject the court found that the value of the plant, franchises, existing contracts, lands with water rights, going value, and all rights possessed by the company was $100,000; but that, taking into consideration the value of the plant, the amount the city was paying for light and water, and the necessity for better fire protection as well as the demand for better service in both electric light and water supply, and all other circumstances then existing, the purchase of the plant was not an unreasonable exercise of power. It also found that there was no fraud, misrepresentation, or corrupt acts or practices or improper influences in any wise entering into or inducing the transaction. Numerous witnesses were examined varying widely in their opinions as to specific values and as to practical business values resulting from the existence of an established business situation and relations with patrons. The questions of policy which the council had before it were also presented, relating to the prospective growth of the city, the effect thereon of water and light supply, the obstacles to and expense of providing therefor under the existing contract, the difficulties, legal, financial, and businesswise, in the way of any method of making provision for needs of the community otherwise than by contractual adjustment with the company, the experimental character of any other scheme of water or light supply and great uncertainty as to pecuniary results, and the legal complications to be anticipated with resulting certain expense and probable confusion of public affairs and possible irreparable injuries to municipal prosperity. All these considerations seem to have been weighed with great care by the

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trial court, and we do not find any reason to conclude that the evidence is clearly or at all preponderant against the finding that the terms of purchase were not so unreasonable as to transcend that very broad discretion over questions of policy which is vested in municipal governments, and which, under all ordinary circumstances, will better promote the local welfare than opinions of courts formed under the serious limitations upon their means of ascertaining and appreciating all the elements involved. *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 89, 80 N. W. 1113; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 506, 83 N. W. 851; *Stafford v. Chippewa Valley & E. R. Co.* 110 Wis. 331, 351, 85 N. W. 1036; *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 476, 91 N. W. 971; *Schneider v. Menasha,* 118 Wis. 298, 306, 95 N. W. 94; *Le Feber v. West Allis,* 119 Wis. 608, 613, 97 N. W. 203.

6. Complaint is made of the fact that, after the contract between the company and the city, the former made a warranty deed to one Reese of all its plant, franchises, etc., subject to the purchaser's rights under the land contract. This is claimed to be void as against public policy, because it disables the corporation from its corporate duty to serve the public. If this were conceded, we perceive no relevancy to the already completed contract with the city. That, if valid when made, could not be invalidated by subsequent dealings between the grantor and third persons. Apart from this, however, it cannot be doubted that the legislation which authorized a city to purchase a water or lighting plant in order to perform for itself and its citizens the services agreed to be performed by means of such plant by its former owner authorized as well such former owner to sell and so disable itself from such services. That act was accomplished before the deed to Reese. The company had already become relieved, because disabled, from performing the duty imposed upon it by the original franchise contract. No public policy could be affected by a

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transfer of its mere legal title, which it held solely as security for the purchase price.

We reach the conclusion that the contract assailed in this action was within the authority of the defendant city, acting by its common council, and that plaintiffs are not entitled to any relief preventive of full performance.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

CASSODAY, C. J., took no part.

VILLAGE OF BLOOMER, Respondent, vs. TOWN OF BLOOMER, Appellant.

April 17—May 8, 1906.

Bridges: Joint maintenance by town and village: Neglect of one: Remedy: Notice: Constitutional law: Uniformity in rule of taxation: Classification of municipalities: Implied power to execute laws: Uniformity in town government: Local self-government: Bridge in village may be partly a town bridge: "Navigable stream:" State as party to internal improvement.

1. Where two municipal corporations are jointly charged with the maintenance of a bridge, and one unreasonably neglects or refuses to perform in that regard, the other may carry the entire burden for the time being and subsequently recover of the former, on implied promise, its just share of the expense.
2. In case of the existence of a liability such as is indicated in the foregoing rule, the proper remedy is an action at law, not *mandamus.*
3. In case of two municipalities being jointly liable for the maintenance of a bridge and one unreasonably neglecting or refusing to participate in the necessary work in that regard, that one will be precluded thereby from escaping liability for its *pro rata* share of the expense upon the ground of its not being notified of the precise act giving rise to such expense, and given opportunity to participate in determining upon and doing that particular thing.

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4. The legislature acting reasonably may impose upon a municipality or collection of municipalities the duty, in part, of maintaining a bridge not located within its or their boundaries.
5. The basis of the rule that classification for the purposes of general legislation cannot be based upon existing circumstances only, is that legislation of that sort must necessarily appertain to unchangeable conditions. It has no reference to legislation so applying to present and future conditions as well that the members of the class may be increased or diminished.
6. The rules as to legitimate classification for general legislation are:

   (a) The classification must be based on substantial distinctions making one class really different from another.

   (b) The classification must be germane to the purposes of the law.

   (c) The classification must not be based on existing circumstances only.

   (d) The law must apply equally to members of the class.

   (e) The character of the class must be so different from other situations as to reasonably suggest necessity or propriety, having regard for the public good, of substantially different legislative treatment therefor from that required for such others.
7. The fact that a legislative enactment does not provide in all details for its execution does not necessarily render it void. When the law imposes a duty and fails to provide, specifically, for the manner of performance, and the act to be done is of an ordinary character readily performable by the use of the ordinary instrumentalities of the corporation, by necessary implication power to so perform springs from the imposition of the duty itself.
8. A bridge across a navigable river, on a town road, so intersected by a village plat as to include such bridge within the corporate limits of the village, may be properly made, by law, in part a town bridge.
9. The maintenance of a bridge across a large stream requiring a larger expenditure than could be justly imposed upon a municipality in which it is located, is not a purely local affair of the town or village in which it is located. To require other municipalities to assist in maintaining it does not violate the principles of local self-government.
10. The words *navigable stream* ordinarily mean a stream navigable in fact, one of sufficient capacity to permit of saw logs being floated down the same in times of high water and of small rowboats being used thereon to some extent, and such meaning must be attributed to such words when they are used in a legislative

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enactment, in the absence of ambiguity suggesting, reasonably, that a different meaning might have been intended which is discoverable by judicial construction.

11. The maintenance of a bridge in one municipality in part at the expense of another under the supervision of the executive officers of the two and in pursuance of a duty imposed by law does not violate the constitutional inhibition as regards the state engaging in works of internal improvement.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to recover on a claimed statutory liability.

The complaint is to this effect: Plaintiff, during the occurrences giving rise to its claim, was a village corporation, located within the boundary of the defendant, a duly organized town. A highway which existed in the latter before the creation of the former is in part included within the platted corporate limits of the village, where it is cut by a navigable stream over which since before the village was organized there has been maintained a bridge. In 1903 it became necessary to repair the same temporarily, and later to construct a new one. Upon such necessity appearing, notice was given by plaintiff to the defendant to meet the former to consider in respect to the matter, a time therefor being named. The village board convened pursuant thereto, but the town was not represented. It claimed exemption from liability to aid in maintaining the bridge. Subsequently, plaintiff decided to build a new bridge, and in due course did so, incurring an expense of $2,979. The part thereof chargeable to defendant, dividing the same between the two corporations according to the last prior county equalization of property for taxation, within their respective boundaries, is $2,022.74. March 15, 1904, plaintiff presented a claim therefor to the defendant for allowance. It was disallowed by the town board of audit, and its action was thereafter, at the town meeting in April, 1904, ratified. The commencement of this action was duly author-

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ized by the village board, and it was begun more than ten days subsequent to such occurrences.

The defendant answered, denying that Duncan's creek, the stream in question, is navigable, or that defendant was notified, at any time prior to the building of the bridge, that a new structure was necessary, or of plaintiff's intention in that regard, and alleging that the notice given to the town, mentioned in the complaint, was to the effect that a meeting would be held to consider the subject of repairing the bridge; that subsequently it was repaired, and defendant paid the proportion of the expense thereof plaintiff claimed from it, but without admitting legal liability in that regard; that subsequently, without any notice to the defendant of any necessity therefor, or of such intention, plaintiff caused the new bridge to be constructed.

The evidence, so far as necessary to be considered, will be stated in the opinion.

The cause was tried by the court. There were findings in plaintiff's favor as to all conditions precedent to the maintenance of the action in case of the town being liable under any circumstances. There were also findings to this effect: Duncan's creek is a navigable stream, in that it is floatable for saw logs in its natural state, some portions of the year. There is a town highway through the platted portion of the village, which is crossed by said creek, that being spanned by the bridge in question. May 16, 1903, plaintiff's clerk, by order of its board, mailed to defendant's clerk and each member of its board a notice to the effect that such bridge needed immediate repairs, and a meeting would be held May 26th thereafter, to decide upon the matter. In reply, the village board was informed that the town would not participate in making the repairs. Nevertheless, the former considered the matter, in accordance with the notice, but postponed action as to building a new bridge till July 25, 1903, at which time a favorable conclusion was reached. That conclusion was carried out at

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an expense of $2,978. In the time intervening between the noticed meeting and the making of the contract for a new bridge, temporary repairs upon the old one were made. Thereafter plaintiff made a claim against the defendant for part of the cost thereof, which it paid, denying, however, legal liability in the matter. The proper proportion of the cost of the new bridge, to be borne by the defendant according to a division of the entire expense between the two corporations, on the basis of their last previous county equalization of property for taxation, is $2,022.74. This action was not commenced till the expiration of ten days thereafter.

On such facts the court decided, as matter of law, that the defendant's denial of all liability for the maintenance of the bridge, and refusal to participate in any proceedings in respect thereto, waived notice of the action of the village in regard to the matter, and that it was liable to the latter for $2,022.74, with interest and costs.

Judgment was rendered accordingly.

For the appellant there were briefs by *T. J. Connor,* attorney, and oral argument by *H. B. Walmsley.* They contended, *inter alia,* that money cannot constitutionally be taken by taxation from one municipality and expended on works located in another separate and independent municipality, as is attempted here. For, as the work is carried on by officers not chosen by the taxpayers who make the forced contribution, these officers are, as to them, agents of the state, *i. e.* getting their powers from the state, not from such taxpayers, and therefore the work is, so far, a state work of internal improvement. Const. art. VII, sec. 10; *People ex rel. Hubbard v. Township Board,* 25 Mich. 153; *Meyer v. Thatcher* (Ill.) 8 N. E. 824; *People ex rel. Seipp v. C. & N. W. R. Co.* 118 Ill. 520.

For the respondent there was a brief by *W. M. Bowe* and *Henry Lebeis, Jr.,* and oral argument by *Mr. Bowe.*

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MARSHALL, J. The law under which, in the circumstances stated, it is claimed the liability adjudged in the trial court accrued, is ch. 284, Laws of 1899. The material part thereof is as follows:

"Every village in this state . . . shall constitute a separate road district. No part of the streets or highway . . . shall be in any road district established by the town board, nor under the control of the town officers, provided that bridges across navigable streams on town roads shall be built, maintained and repaired by the town and village jointly, the expense to be borne by each in proportion to their equalized valuation as is fixed by the county board. Provided that nothing in this section shall be construed as applying to bridges on public highways outside the platted portion of any incorporated village."

It is conceded that if appellant is liable to respondent at all on account of the construction of the bridge in question, the measure thereof was properly determined; but it is contended that if the law is valid and such bridge is within the class mentioned therein no liability accrued to respondent, because the law provides for joint control in the building and maintenance of such a bridge; that the town could not be put in default without a reasonable necessity for a new bridge, it having been given opportunity to participate in considering the question of its construction and incurring the expense, and refused to take part in the matter. That is conceded, as we understand it. The trial court so viewed the case, but decided that appellant's attitude had been such as to preclude it from escaping the liability on that ground.

On the question of waiver by appellant, it seems, the decision of the trial court was right. The town board was formally notified that the old bridge needed immediate repairs, and of a time and place when a meeting would be held to decide upon the question in respect thereto. The reply made that the town had decided not to take any part in the matter, ratified, as it was, at the town meeting in the spring of 1904,

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was a plain repudiation of all liability for the maintenance of the bridge. It does not seem to be material that the notice given to the town board referred to repairs, not to construction of a new bridge, in view of determination of the town not to recognize any liability whatever in respect to the matter. Moreover, as the record shows, before the bridge was accepted a joint meeting of the village board and the town board was held for the purpose of such acceptance, the latter participated in the examination of the bridge for such purpose, and thereafter was present when the formal proceedings of acceptance were had but did not take any part therein either affirmatively or negatively. So it is clearly seen that, regardless of opportunity therefor, the town would not have taken any more active part in the matter than it did. It challenged the position of respondent as to its liability, and went just as far in participating as it could safely without, in the judgment of the board, jeopardizing its position. The only way the bridge could have been constructed under the circumstances, and it seems to be conceded that a new structure was necessary, was for the village to proceed as it did, taking its chances as to obtaining judicial vindication of its claim. In that view *Waupun v. Chester,* 61 Wis. 401, 21 N. W. 251, rules the case in favor of respondent. The principle governing the matter was there phrased substantially as follows:

"If one of two towns which are jointly bound to keep a bridge in repair refuses to join in making necessary repairs, the other town may make them and recover the proper proportion of the expense thereof from the town so refusing."

The foregoing is but an application to particular facts of the broader rule that where one person owes a clear duty to another in respect to the performance of some service requiring pecuniary outlay, and unreasonably refuses to perform that service, such other may himself perform it or cause the same to be performed and hold such person liable upon im-

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plied promise to pay the reasonable expense incurred in respect thereto. The following are a few of the many illustrations existing of the application of such rule: *Reed v. Jones*, 8 Wis. 392; *West Bend v. Mann*, 59 Wis. 69, 17 N. W. 972; *Pa. R. Co. v. Duquesne*, 46 Pa. St. 223; *Centerville v. Woods*, 57 Ind. 192; *Doane v. Badger*, 12 Mass. 65; *Campbell v. Hand*, 49 Pa. St. 234; 4 Kent, Comm. 371; 7 Am. & Eng. Ency. of Law (2d ed.) 326, and cases cited.

The law in question is challenged as unconstitutional in that the placing of villages having bridges on town roads within the platted portions of their boundaries and towns in which such villages are located in a class by themselves, for the maintenance of such bridges, is not legitimate classification and so violates the constitutional command as to uniformity of taxation. On this *Battles v. Doll*, 113 Wis. 357, 89 N. W. 187, is referred to as quite conclusive.

It was held in the case cited that classification for the purpose of exempting property of villages from general taxation, for a specific object, in counties of which such villages form a part, the exemption having reference to whether such villages have within their corporate limits bridges which they maintain, is not legitimate. Here the question is whether the classification of towns having villages situated therein, for the joint maintenance of bridges across navigable rivers in the platted portions of such villages, is legitimate. We are unable to see that the case, as to its facts or principles, falls necessarily within the discussion in the *Battles Case* as to classification by reference to physical conditions. It seems to rather fall clearly within the principle laid down in *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 398; *State ex rel. Star Prairie v. St. Croix Co.* 83 Wis. 340, 53 N. W. 698, and the like, to the effect that in case of need of a bridge requiring exceptionally heavy expenditure for its maintenance, it is legitimate for the legislature to impose the

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burden thereof, in part, on territory of a municipality or municipalities other than that in which the bridge is located.

The court, in the first case cited, which has since been followed, quoted approvingly and based its decision on the doctrine, deduced from authority, found in Cooley, Taxation (2d ed.) at page 683, to this effect: There is special need of legislative authority, in special situations springing from the fact that the burden for an object not purely local, like the maintenance of an expensive bridge on an important thoroughfare running through the country, would be too great to be justly imposed upon the particular municipality within which it is located, to lay such burden in part upon outlying districts. The legislature possesses such power, and the manner of its exercise is a matter of legislative discretion. The law relating to county aid to towns for bridge purposes has been often approved. In that each county is made a taxing district, excepting only such portions as are included within the limits of villages, which maintain their own bridges. The law here makes every town a taxing district in common with the village situated within its boundaries, as to the maintenance of a bridge across a navigable stream on a town road in the platted portion of the village. We are unable to see any distinction between the two laws in principle.

The particular feature of the law which is supposed to locate it outside of the rule as to legitimate classification, is that it is based, in part, on physical conditions which cannot be changed. True, that was spoken of in *Battles v. Doll* as not a proper basis for classification because, as it was said, no room is left for additions to the class.

It seems the doctrine that legitimate classification cannot be based upon existing circumstances only, precluding any change in the membership of the class, first found declared here in *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270, and subsequently many times followed, was wrongly applied

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in *Battles v. Doll.* The decision was not based on such application. So the want of appreciation of the logical basis of the doctrine aforesaid evinced by the discussion was overlooked. Such doctrine as to such cases applies only to legislation directed solely to existing localities characterized presently by the special circumstances supposed to warrant the special treatment: legislation which necessarily contemplates a class presently determinable as to membership, and unchangeable in that regard in the future. The real ground of the rule was stated in *Wagner v. Milwaukee Co.* 112 Wis. 601, 607, 88 N. W. 577, quoting with approval from Binney's work on the subject (p. 78), thus:

"If the membership of a class be unchangeable then the law applies only to the individual members and can never apply to others. Such a law is clearly special."

Mr. Binney gives this illustration for the better understanding of the matter:

"If Cincinnati be the only city in Ohio that has or ever can have a population of 200,000 by the census of 1870, or Columbus the only city of the second class with a population of over 31,000 by the same census, or Akron the only city of the third class with a population of 12,512 at the census of 1880, then a law passed for all cities to which these circumstances only apply, is passed for Cincinnati, or Columbus, or Akron, just as exclusively as if they were specially mentioned."

We have just as good an illustration, perhaps, in *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018. The legislation was in form for cities of the first class, empowering them in respect to a particular matter, the power to be exercised only during the year 1897. The law was declared unconstitutional because the city of Milwaukee was the only city of the first class existing at the time of its passage, or which could in any reasonable probability exist during the time of its contemplated operation.

So it will be seen that a law having no prospective opera-

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tion, a law dealing with existing or past conditions, is quite unlike the one in question. If the law here only related to such cases of a village corporation within the boundaries of a town having a bridge within the platted portion thereof across a navigable stream as existed at the time of its passage, then it would fall under the condemnation of the rule counsel so confidently invokes. Manifestly it is not such a law. It applies to existing and future conditions as well. In case of the formation of a new village having such a bridge, or of extension of the platted portion of an existing village so as to include such a bridge, or the construction of such a bridge in the platted portion of a village existing at the time of the enactment where none existed theretofore, and in other situations that might be mentioned, the law would apply.

Enough has been said to show clearly, it is thought, that the rule as to classification with reference to existing circumstances only has no reference whatever to legislation with reference to physical conditions in whole or in part that cannot be changed, but which at some points require municipal expenditure today and at others not, and those which do may be added to from time to time and diminished from time to time, according as circumstances change. The classification here seems to satisfy every essential laid down in the books. It is based on substantial distinctions making one class really different from another. It is germane to the purpose of the law. It is not based on existing circumstances only. The law applies equally to the members of the class. The character of the class is so far different from other situations as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good, of substantially different legislative treatment. *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954. The idea is that bridges exist in villages and are liable to increase in number over streams of such size as to require a greater expenditure of money in their construction and maintenance than would

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be justly chargeable to the villages alone, since such bridges are substantially parts of town highways and are important to the latter second only to the villages, if second at all.

The further point is made that the law is fatally defective because the legislature omitted providing details for carrying it out. Our attention is called to the fact that by sec. 1318, Stats. 1898, the supervisors of a town are empowered only to levy a bridge tax of $300, and to levy it for a bridge in their town. Other provisions of the statutes are referred to. There is no need of considering them in detail. Suffice it to say, counsel is right to the extent that they do not fit the situation in hand. They do not apply thereto at all. The law itself, by necessary implication, provides for its execution. In mandatory language it provides for the building, maintenance, and repair of certain bridges by towns and villages jointly, the expense to be borne by them respectively in proportion to the equalized valuation as fixed by the county board. Build, maintain, and repair jointly and at joint expense, is a term not difficult to understand. It is absolutely free from ambiguity. The imposition of the duty necessarily carries with it the right and duty to incur the necessary expense, and in the only way practicable: by means of action by the executive department of the town and the village. The right and duty to incur the expense, again, carries with it by necessary implication the duty of the people of the town to make the necessary appropriation and provide by vote for levying the necessary tax to meet the expenditure. Upon their failure so to do a suit upon implied promise, not the remedy by *mandamus,* is the proper method to vindicate the right of the matter, as is ruled in *Waupun v. Chester,* 61 Wis. 401, 21 N. W. 251.

It is a mistake to suppose that a law imposing upon a municipality the duty to do a particular thing requiring public expenditure is necessarily void because it does not provide in detail procedure to be followed. When the thing to be done

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is one of an ordinary kind, and only requires in execution the use of instrumentalities possessed by the corporation, all the details to be followed in performance of the duty imposed are provided for by necessary implication from the imposition itself. From the duty to act springs the legislative authority to act, and act in the customary way. That way is through the executive department of the municipality as to incurring the expense, and action of the people as to providing for the payment. In the case above cited the court held that the right to maintain a bridge, of necessity, included the right to do all those things essential to enjoyment of the privilege. The principle is elementary so far as relates to the ordinary business of conducting municipal affairs. Smith (Beach) Modern Law of Mun. Corp. § 673. It seems that the authorities cited by counsel to the proposition that a law requiring an act to be done without providing expressly for its execution is void, which treat of special situations, do not apply here. If the court were to exercise power to nullify all legislation not providing expressly for all administrative features it would not take long to create confusion of a very prejudicial character.

The further point is made that the law violates sec. 23, art. IV, of the constitution, providing that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable. The argument at this point is based largely on the idea that the law here deals with the subject of the construction of village bridges in certain cases at the expense, in part, of the towns within which the villages are located. We do not so view the law. It provides expressly that certain bridges within the corporate limits of villages shall be deemed to be town bridges as well as village bridges. So far as they are town bridges they are placed under the control of the towns, and so far as they are village bridges they are placed under the control of the villages. The idea is that each corporation

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shall maintain its own bridge. It no more violates the constitutional provision referred to than the law providing for joint maintenance of bridges on town-line roads.

The point is made that the law violates the constitutional right of local self-government. That is answered substantially by what we have said as to the bridges referred to being as much local affairs of the towns as of the villages. The argument that the law provides for construction and maintenance of village bridges at the expense in part of towns is clearly, it is thought, beside the case. But if it were otherwise it would be answered by the rule well established that the maintenance of a bridge on a highway is not a purely local matter which must be left, necessarily, to the sole discretion of the town within which it is located. The state at large is interested in such matters, and may impose the duty on one municipality or a collection of municipalities to aid in maintaining a bridge in another. *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 396; Cooley, Taxation (2d ed.) 683; *Will Co. v. People,* 110 Ill. 511. Such laws, this court has held, do not necessarily contravene any constitutional restriction upon legislative interference with local self-government. All that is said as to the importance of preserving inviolate the constitutional guaranty in that regard meets with approval. No one, however, need go outside the decisions of this court, as seems to have been thought was the case, to find emphatic declarations on that line. *O'Connor v. Fond du Lac,* 109 Wis. 253, 265, 85 N. W. 327.

Points that *mandamus* is the proper remedy, that the state did not contemplate power on the part of the village to initiate proceedings to build a bridge at joint expense, and that there is no such thing as a town road or a town bridge in the village corporation, have all been perhaps sufficiently answered by references thereto made, directly or incidentally. This court has held in a similar situation, as we have indicated, that an action upon implied promise is the proper rem-

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edy. The right of the village to take the initiative is no more given than it is afforded the town. The relations between the two, by force of the statute, are the same as those between joint owners of a milldam. In case of needed expenditure neither can put the other in default without affording him an opportunity to participate in considering the necessity for the expense and manner of incurring the same; but if one unreasonably refuses to bear his part the other may proceed and do the whole. Then, from the circumstances and the legal duty the law will raise an implied assumpsit in favor of the active party, for contribution.

True, generally speaking, a town bridge is one wholly within a town and a village bridge one wholly within a village, but the legislature having seen fit to provide that a town road which is intersected by a village plat and crossed by a navigable stream, requiring to be bridged to make the road usable, shall be deemed to be a town road and the bridge a town bridge to the same extent that it is a village street and a village bridge as regards the maintenance of the latter, there is no reason why effect should not be given thereto. The meaning of the statute on the subject is perfectly plain, and it must be administered accordingly.

Some question is raised as to whether the term "navigable stream" as used in the law has reference to navigable as regards public rights: navigable in fact, including what is called a "floatable stream:" one of sufficient capacity to float saw logs during some portion of the year. It is considered that such is the meaning. That is the sense in which the term "navigable" is ordinarily understood, and such ordinary sense is the one always to be adopted in construing legislative enactments in the absence of some ambiguity permitting the adoption of a different meaning. Under the uniform holdings in this state, public waters include streams of sufficient capacity to float saw logs in spring or other freshets, though so small that ordinary rowboats cannot be used there-

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in without dragging or pushing the same on the bottom in shallow places. *Weatherby v. Meiklejohn,* 56 Wis. 73, 13 N. W. 697; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273. In that light it is considered that the finding as regards the character of the stream is not contrary to the clear preponderance of the evidence.

The further claim is made that the law is invalid, as contravening the constitutional provision inhibiting the state from contracting any debt or being a party in carrying on any work of internal improvement. We cannot perceive sufficient merit in that to warrant more than a passing notice thereof. The making of public improvements by minor subdivisions of the state, like towns, cities, villages, and counties, by means of the ordinary revenues of such municipalities, and under the management of their own officers, has not the remotest relation to the constitutional provision referred to.

After a careful review of the briefs of counsel we do not discover any reason advanced for disturbing the judgment which has not been referred to, except such as do not seem to merit particular attention.

By the Court.—The judgment is affirmed.

TOWN OF WASHBURN, Respondent, vs. LEE and others, Appellants.

April 17—May 8, 1906.

(1) *Stipulation limiting plaintiff's claim: Relief from: Opportunity for further defense.* (2, 3) *Illegal payments by public officer: Action on his bond: Right of sureties to have other remedies exhausted, or to subrogation: Practice: Parties.*

1. In an action by a town on the bond of its treasurer, based on his failure to account for certain moneys, it was stipulated that unless a certain payment was illegal the treasurer had accounted

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for all moneys received. Defendants, in proving that such payment was not illegal, proved that the amount paid had been immediately repaid to the treasurer so that he again became chargeable therewith; and it appeared that he had not further accounted therefor. *Held*, that while it might have been proper to allow plaintiff to be relieved from the stipulation and to base its claim on the later failure to account, yet it was error to grant a recovery on such new claim without giving to defendants an opportunity to meet it by any defense they might have thereto.

2. If money is paid by a town treasurer, or by a bank having custody of the town moneys, for a known illegal purpose, the town may recover it from the payee or from the bank, their liability to the town, in such a case, being direct and primary; and the sureties on the treasurer's bond, upon being sued to make good the amount of such illegal payment, are entitled either to have a recovery against them postponed until exhaustion of the town's remedy against the persons primarily liable, or to have such persons made parties, to the end that there may be a complete and effective adjudication as to such primary liability and the extent of the rights of the town to which the sureties may be subrogated.

3. Under our Code (secs. 2657, 2656*a*, and 2610, Stats. 1898) such relief can be obtained fully by the sureties in the action against them on the bond.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action to recover upon the official bond of defendant *Lee* as treasurer of the town of *Washburn* for the year April, 1902, to April, 1903, the other defendants being sureties upon that bond. The amended complaint set forth as a cause of action the receipt by *Lee,* officially, of $159,465.94 and disbursement on behalf of the town of $142,835.70, and no more, and that he wrongfully and unlawfully converted to his own use on and between the 1st day of June, 1902, and the 1st day of October, 1902, the sum of $16,630.24, and still wrongfully retains the same and has refused to pay it upon a proper demand by his successor in office. The answer was general denial.

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Upon the action being tried to the court without a jury, all claims were abandoned except with reference to two payments of $5,035 each, made at the same time, namely, about July 15, 1902, upon two town orders, payable, respectively, to the Northern State Bank and the Bayfield County Bank. The plaintiff apparently contended that these orders were given for an unlawful purpose, and that payment of them by the treasurer was unlawful and, therefore, made him and his bondsmen liable. The plaintiff conceded receipt of some $2,000 from the Northern Pacific Railway Company, which, upon the theory that these alleged unlawful orders were for the benefit of the Northern Pacific Railway Company, should be deducted from the treasurer's liability. There was also offered in evidence, however, the treasurer's report, his statement of account and settlement with the town, whereby it appeared that he had received due credit for the payment of these orders. Evidence was also offered that the orders were given to the two banks to procure loans for a short time pending the collection of license moneys, and that the banks paid and credited to the treasurer in his bank account the amount thereof, but that he did not in his settlement with the town charge himself with the receipt of that money.

The court made its findings apparently ignoring the claim that the payment of the money on these orders by the treasurer was illegal, and therefore a conversion, but found that on the 15th day of July, 1902, he, as treasurer, collected and received the amount thereof, $10,000, and has at all times refused and neglected to account therefor and pay it over to his successor, except that he has since paid the sum of $2,000. Accordingly, the court entered judgment for the sum of $8,000, with interest and costs, from which the defendants appeal.

For the appellants there was a brief by *A. W. McLeod* and *Louis Hanitch,* attorneys, and *L. K. Luse,* of counsel, and oral argument by *Mr. Luse.*

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George G. MacDonald and *W. M. Tomkins,* for the respondent.

DODGE, J. While by the complaint is presented a cause of action to recover a general balance of $16,630.24 by reason of *Lee's* failure to account for all the moneys received by him as treasurer, the claim became defined by certain affidavits before trial as a suit to recover the amount of certain specific illegal payments for which the treasurer had received credit. These were restricted to payment of two town orders of $5,035 each, payable one to each of two banks, claimed to have been unlawfully issued for loans from such banks for money to be paid either by the bank or the town officers to the Northern Pacific Railway Company as inducement to establish railroad. Upon the trial, plaintiff having offered evidence of the issue of such orders for a loan "for general purposes," and also put in evidence the treasurer's report and settlement for the year in question, which showed that he had taken credit for payment of these two orders, an admission or stipulation was made that the only misappropriation claimed for "is the payment of these two orders by the defendant *Nels Lee* as town treasurer, and, unless such payment was illegal, he has accounted for all moneys received." Thereupon it was made to appear, substantially without dispute, that the payment of these orders was merely ostensible; that, although *Lee* gave to the bank checks for the amount of the orders, the bank on the same day gave him a credit to the same amount, in his regular bank account, as treasurer, thus entirely offsetting the charge for the checks drawn. Thus it was established that by the ostensible payment of these orders, which plaintiff proved, not a dollar passed out of the treasury of the town. It was also made to appear, beyond the merest suspicion, that *Lee* paid the orders in perfect good faith and without any knowledge of impropriety or illegality in their issue; they being

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regular on their face. Thus it was established that the payment of these orders caused no loss to the town and had in it nothing of illegality more than curiously cumbersome bookkeeping. But defendants, in thus proving that the payment was not illegal, had proved that it was no payment, or, more exactly, that the money had by the bank immediately been repaid to the treasurer; so that, if he took credit for paying the orders as he had done in his report and settlement, he should charge himself with a like amount as received at the same time. No such charge appearing in his report and settlement, the court proceeded to make findings wholly ignoring the question of the legality of the orders or their payment, but declaring that the treasurer had received from the banks the proceeds of these orders and had neglected and refused to account for it or pay it over to his successor, but, at some time between its receipt, July 15, 1902, and April 8, 1903, he had converted it to his own use.

This narrative, extracted from much confusion of evidence and record, makes plain that the recovery is not at all within the limits of the stipulation, on which, till withdrawn, defendants were entitled to rely. While, doubtless, upon the showing made after the stipulation, it would have been proper to allow the town to be relieved from it and assert right of recovery for failure to account for the proceeds of the loan when it appeared that *Lee* had received them, yet the defendants should have the concurrent right to meet such new claim by showing, if they could, that *Lee* had made other payments, or had other offsets against such receipt, even though not in his report. Until notified of change in plaintiff's position, they had no occasion to do this. There are several intimations in the record, not perhaps rising to the dignity of evidence, suggesting at least a possibility of some such further payment either by the treasurer or with his knowledge and perhaps consent. Thus, in a petition filed by the defendants, it is asserted that $10,000 was paid by the banks to one Yates by or-

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der of the town board. If any such payment was made out of the moneys in bank in the name of *Lee* as treasurer, it might constitute a credit to him, if legal and proper. That some such payment may have been made is suggested by the appearance in the bank account of two debits immediately together, each something more than $10,000. One of these doubtless included the checks for the two orders, which were offset by the credit of same date of the amount of those orders; but of the other we have no explanation, and it may cover a $10,000 payment to Yates, as suggested. We are convinced that no judgment can safely stand upon this record; not that which was entered below, because, by reason of plaintiff's stipulation, defendants have been diverted from establishing a defense which they may have to the failure to account for the money credited to *Lee* in his bank account; not a judgment in favor of defendants, because the present liability is entirely within the cause of action stated in the complaint, but did not fully develop itself until after the stipulation was made. We deem it the only safe course to remand for further trial of these questions.

There is another assignment of error, not material to a judgment on the present grounds of recovery, which, however, might become material if the plaintiff should sustain its claim of an illegal payment with which the defendant *Lee* was connected. That assignment arises in this way: Upon a motion for a reference the plaintiff filed an affidavit declaring that its claim was for the conversion by *Lee,* to himself or some other person, of the two $5,035 sums. Thereupon the defendants presented a petition alleging that they thereby, for the first time, learned that plaintiff so claimed, and that the only transaction with reference to said sums consisted in the payment of regular orders, innocently, by *Lee,* but that the two banks to which the orders were drawn each paid, by order of the town board, the sum of $5,000 to one Yates, a resident of *Washburn,* and that the actions of the town board

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and of said banks in making the loans, and of Yates in taking the money, were illegal, as they and each of them knew; that the respective banks and Yates were accessible, solvent, and able to respond for the amounts specified; that *Lee* was wholly insolvent; and that, if the defendant sureties were obliged to pay, they would be without adequate remedy at law. They prayed that the plaintiff be restrained and enjoined from prosecuting the present action until it should have exhausted its remedy to recover back its moneys from the two banks and *Lee;* or, in the alternative, that such third persons be brought in as parties and their liabilities adjudicated, and sureties' rights to subrogation of the claim against them be adjudged—accompanying such petition with a bond conditioned for the payment of any expenses or costs the town might incur in proceeding against such third persons and offering further or other bond as the court might direct. The application of this petition was denied, over exception by the defendants.

There is no doubt, under our decisions, that the recipient of public moneys illegally paid is liable therefor; certainly if he received them with knowledge of the facts rendering the payment illegal. Every public officer dealing with public moneys is an agent with strictly limited powers, and those limits are presumptively known of all men, so none can assert belief in any broader agency. An illegal payment has no effect on the title of the money, so it remains the property of the principal, the public, and can be recovered back. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Webster v. Douglas Co.* 102 Wis. 181, 194, 77 N. W. 885, 78 N. W. 451; *Etsell v. Knight,* 117 Wis. 540, 94 N. W. 290; *Douglas Co. v. Sommer,* 120 Wis. 424, 98 N. W. 249; *Wis. Cent. R. Co. v. U. S.* 164 U. S. 190, 17 Sup. Ct. 45. If, therefore, money was paid either by the town treasurer or by the banks, for a known illegal purpose, to Yates, whether by order of the town board or otherwise, the right of the town to recover it back from him is clear; also from the paying banks, if they, as

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custodians of public moneys, acted with knowledge of absence of legal authority. Such liability to the town is direct and primary. They can plead no equity in favor of their retention of such illegal receipts. The defendant sureties, on the other hand, are favored in equity. They are called on to pay what is not their own indebtedness. While the town has full legal right to look to them to make good the delinquencies of their principal, still equity will require that they be not called on, if the town can obtain reimbursement from persons or property primarily liable to it, without substantial inconvenience or expense. Further, if the sureties are required to pay, equity will ordinarily see to it that they be subrogated to any rights the creditor may have against persons or property primarily liable. 4 Pomeroy, Eq. Jur. (3d ed.) § 1419; 1 Brandt, Sur. & Guar. (3d ed.) 324, 350, 353; *Sweet v. Jeffries,* 48 Mo. 279; *Bittick v. Wilkins,* 7 Heisk. 307; *German Am. Sav. Bank v. Fritz,* 68 Wis. 390, 32 N. W. 123.

In the light of these elementary principles it is plain that, if the recipients of any illegal payment are liable and solvent, they ought to repay such sums rather than the sureties be required to indemnify the town for the loss; or, if the latter do pay, they ought to be subrogated to the right of the town to reclaim its funds from the unlawful holders. The petition of the defendant sureties declares that the recipients of the moneys are solvent and accessible and offers to pay any expense which the town may incur in efforts to collect from them. Obviously, if plaintiff recovers from defendants in this action on the ground of specific illegal payments, the court must consider the facts and the law establishing such illegality. But, if such recipients are not parties to the action, such consideration and adjudication will not bind them, and, if the defendant sureties are subrogated by law to rights against them, the same questions must be tried at least once again, perhaps thrice, with all the possibilities of a different decision; that is to say, all rights arising out of such illegal payments cannot

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be finally determined without the presence of the persons whom the petitioners ask to have brought in as parties. Before the joining of law and equity jurisdiction in the same court this situation would have presented a very persuasive case for a court of equity to have enjoined further prosecution of this action until plaintiff had exhausted its remedy against the recipients and holders of its money (4 Pomeroy, Eq. Jur. [3d ed.] § 1362), and in at least one well-considered case that was done (*Bunting v. Ricks,* 2 Dev. & B. Eq. 130). See, also, *Sweet v. Jeffries,* 48 Mo. 279.

Under our Code, however, the same relief is available with much less of delay and inconvenience to either court or plaintiff. 4 Pomeroy, Eq. Jur. (3d ed.) § 1368 *et seq.* By sec. 2657, Stats. 1898, it is provided that defendant "may set forth as many defenses and counterclaims as he may have, whether they be such as were formerly denominated legal or equitable." This includes such facts as formerly would support an injunction against further prosecution. *Chicago & N. W. R. Co. v. McKeigue,* 126 Wis. 574, 105 N. W. 1030. By sec. 2656*a,* Stats. 1898, it is provided that a "defendant may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in. . . . The court or judge may make such orders for the service of the pleadings, the bringing in of new parties, . . . as shall be just." Also, sec. 2610, Stats. 1898, requires:

"When a complete determination of a controversy cannot be had without the presence of other parties, or any persons not parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court shall order them brought in."

The petition clearly shows a right in the defendant sureties to relief obtainable only by equitable procedure, either to

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have recovery against them postponed until exhaustion of the town's remedy against others primarily liable, or to be subrogated to plaintiff's rights against those others; and that, to a complete and effective adjudication as to such liability and the extent of the rights to which the defendants shall be subrogated, it is essential that such others be parties to the present action. The statutes mentioned contemplate and require that in such a situation the necessary third persons be brought in as parties, whereupon plaintiff can be required to make specific complaint to set forth the illegality which it claims affected the payments, and the defendant sureties can, by answer or cross-complaint, assert their claims to an adjudication of the liability of such new parties and judgment against them in favor of the town or in favor of these defendants, if they shall pay the money which the town has lost. We are convinced that such an order should be made.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law and the foregoing opinion.

COTTINGTON, Appellant, vs. SWAN, Respondent.

April 17—May 8, 1906.

Contracts in restraint of trade: Reasonableness: Validity.

1. A contract in restraint of trade will not be held invalid if the restraint imposed is reasonable with reference to the situation, business, and objects of the parties and is not specially injurious to the public.
2. A contract by the vendor of a livery business in a village, with its good will and equipment, not to engage in that business directly or indirectly in that village while the purchasers or their heirs, executors, or administrators should be engaged in such business in the village, is *held* reasonable and valid.

APPEAL from an order of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

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The plaintiff alleges that on May 2, 1904, he and one C. B. Ackley purchased defendant's livery business, good will, and property, consisting of the usual equipment for conducting such a business, located in the village of Bloomer in this state; that they paid for such business, property, and good will the sum of $800; and that defendant duly transferred it to them upon payment of the specified consideration. The defendant, as a condition of such sale and transfer, covenanted and agreed as follows:

"And I do further covenant and agree to and with the parties of the second part and their heirs, executors, and administrators that I will not engage in the livery business, either directly or indirectly, or be or become in any manner employed or connected with such business in the village of Bloomer in the county of Chippewa and state of Wisconsin, so long as the said parties of the second part or either of them or their heirs, executors, or administrators shall engage in such livery business within said village."

The plaintiff has acquired from C. B. Ackley all rights, interest, and causes of action arising out of such contract, and since such transfer has been and is now engaged in conducting the livery business so purchased from defendant. The complaint further alleges:

"That the said defendant, in violation of said agreement and shortly after the making of the same and prior to the time of the commencement of this action, returned to and commenced conducting the livery business at said village of Bloomer and . . . has been engaged and is still engaged and continues in the business of letting horses and rigs for hire in said village."

The complaint demands as relief that defendant be restrained from conducting a livery business in violation of his contract, and the recovery of $1,000 damages, claimed to have been sustained before the commencement of this action on account of defendant's violation of the contract.

The defendant demurred to the complaint on the ground

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that it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action. The court made an order sustaining the demurrer and plaintiff duly filed an exception. This is an appeal from such order.

The cause was submitted for the appellant on the brief of *Henry Lebeis, Jr.*, attorney, and *W. H. Stafford*, of counsel, and for the respondent on the brief of *W. H. Bowe*.

SIEBECKER, J. The only ground of objection urged to the complaint is that the contract upon which recovery is claimed by the plaintiff is in restraint of trade and the courts therefore will not enforce it nor consider the question of injury resulting from its breach. Contracts in restraint of trade have been repeatedly considered by this court and held to be void as against public policy, "unless limited, as to time, space, and extent of trade, to what is reasonable under the circumstances of the case, because they tend to deprive the public of the services of the persons in those capacities in which they are most useful, and also tend to expose the public to the evils of monopoly." *Tecktonius v. Scott*, 110 Wis. 441, 86 N. W. 672. Condemnation of contracts of this nature has been quite universal by the courts, upon the ground that no person should be permitted to so contract as to preclude himself from following a lawful occupation for the benefit of himself and of those dependent upon him, or to deprive the public of his industry. The vital question in the consideration of every such contract is whether the restraint imposed is reasonable under the circumstances with reference to "the situation, business, and objects of the parties," and if "the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid." *Hubbard v. Miller*, 27 Mich. 15; *Oregon S. Nav. Co. v. Winsor*, 20 Wall. 64. In the

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following cases in this court involving contracts of this kind the determination rested upon these grounds, and if the restriction was found reasonable and just the contracts were sustained as valid; if they unreasonably restricted the parties so as to restrain them from pursuing their occupations or deprived the public of their industry they were held invalid: *Kellogg v. Larkin,* 3 Pin. 123; *Laubenheimer v. Mann,* 17 Wis. 542; *Washburn v. Dosch,* 68 Wis. 436, 32 N. W. 551; *Berlin M. Works v. Perry,* 71 Wis. 495, 38 N. W. 82; *Richards v. Am. D. & S. Co.* 87 Wis. 503, 58 N. W. 787; *Palmer v. Toms,* 96 Wis. 367, 71 N. W. 654.

Under the contract in question defendant sold his livery business and its good will to plaintiff and Ackley for a valuable consideration and agreed not to engage in that business directly or indirectly in the village of Bloomer while the purchasers or either of them "or their heirs, executors or administrators [should] be engaged in such business within said village." It is apparent that the restraint contracted for was a material consideration in inducing plaintiff and his associate to make this purchase from the defendant for the purpose of conducting a livery business in this village, and, under the circumstances, it seems reasonable to assume that defendant could not have secured the consideration obtained for such sale but for the covenant not to engage in such a business in the village of Bloomer. That these considerations must have entered into the making of this contract is apparent from its terms. Are its terms unreasonably restrictive, and is the public thereby deprived of defendant's industry? Manifestly he is not precluded from pursuing this business anywhere outside of this village, and he may engage in any other business within or outside of the village. Under its terms the village may have this very business continued within its limits, for the agreement is that he shall not engage in it so long as it is conducted and carried on by the purchasers or their personal representatives or heirs. If they cease to conduct this

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business at any time, immediate or remote, then defendant may conduct it without restraint. The claim that such restraint would tend to subject the public of this village to a monopoly in this business as conducted by plaintiff is rather a remote speculation, for this field of enterprise for conducting such a business and competing with plaintiff for the public patronage is open to the whole world. Viewing the restrictive provision of this contract as applied to the situation of the parties it is manifest that it was made for the honest purpose of affording a reasonable and fair protection to the interests of the plaintiff in whose favor it was made, and that it was a reasonable one as between them. Under these circumstances and conditions we do not find that the restriction imposed is unreasonable in its operation and likely to cause injury to the public, nor is it an unreasonable restraint upon defendant in the pursuit of his occupation. This makes it a valid contract and entitles plaintiff to relief if defendant has breached it and caused him injury. In the following cases similar contracts have been passed upon and held to be reasonable in their restraint as to time and space and therefore valid: *Cook v. Johnson,* 47 Conn. 175; *Dakin v. Williams,* 17 Wend. 447; *Beal v. Chase,* 31 Mich. 490; *Warfield v. Booth,* 33 Md. 63; *Linn v. Sigsbee,* 67 Ill. 75; *Angier v. Webber,* 14 Allen, 211, 92 Am. Dec. 748, with a full note.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to enter an order overruling the demurrer and for further proceedings according to law.

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FOSTER, Appellant, vs. ROWE, imp., Respondent.

April 17—May 8, 1906.

Taxation: Commission of equalization: Conclusiveness of proceedings: Jurisdiction: Discretion as to evidence: Constitutional law: Delegation of legislative power: Due process of law: Equal protection of the laws: Imposing nonjudicial powers on judge: Appointment of commission: Repeal of statute.

1. The proceedings of commissioners of equalization appointed under sec. 1077*a*, Stats. 1898, if conducted in good faith and within their jurisdiction, are final and conclusive; and a want of jurisdiction must be affirmatively shown.
2. A broad discretion is vested in such commissioners respecting the taking of testimony; and their refusal to hear evidence that property was omitted from the tax roll in a certain city does not render their determination void.
3. The power to equalize taxes is a *quasi*-judicial power, and is not legislative in the sense that it cannot be delegated by the legislature to a board.
4. The commission of equalization provided for in sec. 1077*a*, Stats. 1898, acts upon the different municipalities in the county, not upon the individual taxpayers; and the fact that no notice to taxpayers is required does not render the statute void as depriving any person of property "without due process of law;" nor does the statute deny to the taxpayer "the equal protection of the laws."
5. Sec. 1077*a*, Stats. 1898, providing for appointment of commissioners of equalization by the circuit judge, is not unconstitutional on the ground that it imposes nonjudicial power upon such judge.
6. Where commissioners of equalization appointed under sec. 1077*a*, Stats. 1898, had fully performed their duties and made their determination before the repeal of that statute by ch. 474, Laws of 1905, such repeal did not affect their determination.

APPEAL from an order of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought by a taxpayer of the village of Fairchild in Eau Claire county, on behalf of himself and other taxpayers, to restrain the clerk from carrying out upon the roll for 1901 two sums of money which he had been di-

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rected to levy upon the property of the village in pursuance of two certificates filed with the county clerk by the commissioners of equalization acting under secs. 1077*a* and 1077*b*, Stats. 1898.

The material part of the complaint is to the effect that plaintiff is a resident, taxpayer, and owner of real estate subject to taxation in said village, and brings the action on behalf of himself and other taxpayers; that the county board in 1899 equalized and determined the aggregate valuations of the taxable property in the towns, villages, and cities of said county; that afterwards, on application of the city of Eau Claire under secs. 1077*a* and 1077*b*, Stats. 1898, commissioners to review the equalization were appointed, and such commissioners on review deducted from the valuation of the cities of Eau Claire and Altoona certain sums and added the same to other municipalities; that the county board in November, 1900, equalized the valuations of the county, and thereafter, on application of the city of Eau Claire, commissioners were appointed, who reviewed said valuations and deducted from the valuation of the cities of Eau Claire and Altoona and added to other municipalities certain sums; that, when the commissioners who equalized the valuations for 1899 and 1900 were hearing evidence, the representatives of certain towns in said county appeared before them and offered to show that there was over $1,000,000 worth of property in the city of Eau Claire on the 1st day of May of the year under investigation, which consisted of credits due to residents from banks in said city, which had not been assessed, but entirely omitted from the assessment of that year, and which were not exempt from taxation; and that the commissioners who equalized for 1899 and 1900 refused to receive any evidence as to such property, and did not take into consideration in making their equalization any portion of said $1,000,000; that the same should have been listed for taxation in said city of Eau Claire for said years 1899 and 1900; that the

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county board for each of said years, in determining the valuations of the property of said city of Eau Claire, took into account said $1,000,000; that representatives of said town also offered to show that there was a large amount of money, accounts, and credits aside from said deposits due from solvent persons to residents of said city of Eau Claire on May 1, 1899, and 1900, respectively, which had not been returned for taxation or assessed in said years, but which had been omitted from the assessment for each of said years, and which were not exempt from taxation; that the commissioners refused to receive evidence of such property, upon the ground that they had no authority to hear evidence upon or consider any property not appearing upon the assessment roll; that said commissioners did not take into consideration said moneys, accounts, and credits, but excluded the same from consideration in arriving at the relative valuation of the real and personal property in the city of Eau Claire, and that there was in fact of such property over $500,000 aside from the deposits in the banks mentioned which was subject to taxation for each of said years; that writs of *certiorari* were issued to review the proceedings of the commissioners for the years 1899 and 1900, and on motions said writs were superseded and the suits dismissed; that an appeal was taken from the order to the supreme court (*State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188); that thereafter, and immediately upon the entry of said order dismissing said suits and before relators therein could prepare their appeal papers, the county clerk of said county transmitted to the defendant, as clerk of said village, his certificate of the amount to be raised by said village as taxes and to be extended by said defendant as such town clerk against the property of the taxpayers of said town for the year 1900; that the aggregate amount of said tax so directed to be raised is $6,451.87, of which $1,234.47 is the sum growing out of the increase of the valuation of said town made by the commissioners who

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equalized for 1899, and $405.05 and expenses is the sum growing out of the increase made in the valuation of said town by the commissioners who equalized for the year 1900; that said sums were directed to be collected of the taxpayers to satisfy the change made by the commissioners who equalized for said years, and that the determination and certificate of said commissioners for each of said years are null and void; that of the total tax directed to be levied $969.72 is state tax, and said sums are not needed for use in carrying on the business of the government of Wisconsin or the county of Eau Claire, but are directed to be levied to be used, and would be used, if paid, for the purpose of making an adjustment between said town and city of Eau Claire in accordance with the determination of said commissioners for said two years; that the town clerk will, unless restrained, insert in the tax roll the illegal tax mentioned; that said illegal tax extended and carried out upon the tax roll will constitute clouds upon the titles to the lands of the plaintiff and other taxpayers, and the amounts will be levied upon their personal property.

The clerk made default, and *Rowe,* a taxpayer of the city of Eau Claire, was allowed to defend, and demurred upon the following grounds: (1) Because the court had no jurisdiction of the subject of the action; (2) because plaintiff had no legal capacity to sue, in that he cannot sue on behalf of the village of Fairchild or the taxpayers thereof; (3) defect of parties plaintiff, in that the village of Fairchild was not made a party plaintiff; (4) want of facts sufficient to constitute a cause of action. From an order sustaining the demurrer this appeal was taken.

For the appellant there were briefs by *W. H. Frawley,* attorney, and *H. B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Wickham & Farr,* and oral argument by *Mr. James Wickham.*

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KERWIN, J. 1. Passing the grounds of demurrer for want of jurisdiction of the court, legal capacity to sue, and defect of parties, we proceed to consider the objection that the complaint does not state facts sufficient to constitute a cause of action. This is the only ground of demurrer which we find it necessary to consider, and, if the complaint fails to state facts sufficient to constitute a cause of action, the order appealed from must be affirmed. We are clearly of the opinion that the proceedings of the board, if conducted in good faith and within its jurisdiction, are final and conclusive, and the question to be considered is whether the allegations of the complaint show such a disregard of duty as to render its acts contrary to law and void. The presumption is in favor of the regularity of the proceedings of the commissioners, and whoever attacks them must show affirmatively want of jurisdiction. *State ex rel. Burnham v. Cornwall,* 97 Wis. 565, 73 N. W. 63.

The duties imposed are statutory. Sec. 1077*a* provides, in effect, for the appointment of three commissioners to review the determination of the county board respecting the valuations of real and personal property in the county to determine what sum upon the hundred dollars should be added to or deducted from the aggregate valuations of real or personal property, or both, as the case may be, as made by the county board in order to produce a just relation between the valuations of real or personal property, or both, in the different cities, towns, and villages in the county; but that such commissioners shall in no case increase the valuation throughout the county above the aggregate valuation made by the county board. The statute further provides for the giving of notice of the application for the appointment of commissioners, and, upon proof of the service of notice and presentation of affidavit stating the facts, the judge shall appoint three discreet freeholders, not residents or owners of real estate in the county, who shall proceed to review and examine in the

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manner provided, and within three months make their determination and file a certificate under their hands and seal in the office of the county clerk of the county, and that the valuation determined shall be final and conclusive. This section provides, generally, with reference to the discharge of duties, compensation, and execution of the trust reposed in them. Sec. 1077*b*, Stats. 1898, provides that the commissioners shall appoint a convenient time and place in such county for hearing any evidence or arguments upon the valuations under review to be offered by any taxpayer or officer of any city, village, or town, and shall attend at the time and place named and hear any evidence or arguments offered on behalf of taxpayers, and shall sit at least five days; and, further, that the commissioners "may adjourn from day to day and from time to time, call for and examine any assessment or taxpayers or records in the county, subpœna and swear witnesses, and, in general, conduct the hearing after the usual manner of a judicial hearing; but they shall hear evidence and arguments and consider the facts as to the valuation of the property of specific taxpayers only so far as in their judgment such valuation bears on the just aggregate valuation of any city, village, or town."

The principal charge made in the complaint, and the only one which it becomes necessary to consider, is that the representatives of different towns in the county appeared before the commissioners when sitting to take testimony and hear arguments and offered to prove that personal property to the amount of about $1,500,000 in the city of Eau Claire, one of the municipalities in said county, had been omitted from the tax roll in the years 1899 and 1900, and that the village of Fairchild, the complaining municipality, was one of the municipalities that made such offer, and that the commissioners refused to hear evidence as to this property on the ground that it was not on the assessment rolls, and reached their conclusion by ignoring and failing to take into account the prop-

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erty so omitted. The question, therefore, arises whether such acts on the part of the commissioners rendered their proceedings void, or whether, in the refusal to hear such evidence, they were acting within their jurisdiction.

It is very plain, from the provisions of the statute above quoted, that the commissioners are vested with a broad discretion respecting the taking of testimony. And this is necessarily so from the nature of the proceeding and the duties imposed. Their duty is not to ascertain the property omitted from the tax roll, nor to take testimony for the purpose of determining that question, but to call for and examine assessments or taxpayers or records in the county, and consider the facts as to the valuation of the property of specific taxpayers only so far as in their judgment such valuation bears on the just aggregate valuation of any city, village, or town. The commissioners were obliged to sit five days only to take testimony and hear arguments, and to hold that they must take all evidence offered which they did not regard pertinent might in any case defeat the purpose of the statute. It is very plain, from the express language of the statute, that they are required to take only the evidence of such taxpayers as in their judgment may tend reasonably to aid them in the performance of their duties. The extent of their duties, the amount of property to be examined, and the limited time for taking testimony and hearing arguments, in connection with the language of the statute, clearly show that it was the intention of the legislature that a broad discretion should be vested in the commissioners respecting the taking of testimony and the performance of their duties. The statute provides that the commissioners shall conduct the hearing after the usual manner of a judicial hearing. They are presumed to know from the examination of property throughout the county, and the valuations placed thereon by the assessors and board of equalization, what evidence will best aid them in determining the basis upon which property was assessed in the different

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municipalities in the county, to the end that they may properly equalize the valuations between the different municipalities. The fact that certain property was omitted from the assessment rolls in a municipality would not necessarily aid them in the performance of their duty. To attempt to discover all property omitted from the assessment rolls in the different municipalities would manifestly be a hopeless task, and one which it is very plain the legislature never intended to impose upon them. The information accessible to them by examination of property throughout the county, and the means provided by the statutes (secs. 1007, 1010, 1050, 1066), would be far more effectual in affording aid to the commissioners than evidence of specific items of property omitted from the assessment rolls, even if they were obliged to consider such evidence. The duty of the commissioners was simply to review the action of the county board and to examine and determine what sum upon the hundred dollars should be added to or deducted from the aggregate valuation as made by the county board, and the county board made its equalization upon the assessments made throughout the county. It had nothing to do with the property omitted from the tax roll. We think, therefore, the refusal to hear evidence that property was omitted from the tax roll in the city of Eau Claire was not error and is no ground for attack upon the proceedings of the commissioners.

2. The constitutionality of the law is challenged by appellant upon several grounds, while on the part of the respondent it is asserted that the law has been declared constitutional by this court in several cases. *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Burnham v. Cornwall,* 97 Wis. 565, 73 N. W. 63; *Outagamie Co. v. Greenville,* 77 Wis. 165, 45 N. W. 1090; *State ex rel. Manitowoc v. County Clerk,* 59 Wis. 15, 16 N. W. 617; *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777. While it is

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true this court has in some cases where the law has been before it treated these statutes as valid, it has, it is believed, never passed directly upon some, at least, of the questions presented by the appellant. Appellant contends that the law in question is unconstitutional because it assumes to delegate to the commissioners a function purely legislative, and the legislative power necessary to execute it, and relies upon *West v. Ballard,* 32 Wis. 168; *Teegarden v. Racine,* 56 Wis. 545, 14 N. W. 614; and *In re Incorporation of North Milwaukee,* 93 Wis. 616, 67 N. W. 1033. In *West v. Ballard, supra,* this court held that the action of the county board in making the equalization was in the nature of a legislative act, and therefore a court could not set aside its acts even for fraud. So, if that case were held authority here, and the commissioners occupied the position of a legislative body, clearly, upon the allegations of the complaint, the demurrer should have been sustained, assuming that the legislature had power to grant such authority to the commissioners. There is nothing in *West v. Ballard* indicating that the legislature cannot confer power upon the commissioners to equalize taxes between the municipalities of a county. *Teegarden v. Racine, supra,* does not seem to touch the question. In the *North Milwaukee Case* it was held that the creation of municipal corporations is the exercise of legislative power and cannot be delegated except as authorized by the constitution, and that the circuit court cannot determine whether it is for the best interests of the people of a locality that they be incorporated and fix the boundaries of the municipality. In the latter case it was held that the circuit court performed a legislative function in making the order incorporating the village, and therefore the statute authorizing such act was unconstitutional. It will be seen, however, that the case has no application to the question before us. The power to equalize taxes is not legislative, in the sense that it cannot be delegated by the legislature to a board. On the contrary, the authority of the legislature to

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create such boards, and authorize courts to appoint them, is well established. This doctrine is recognized and asserted in the *North Milwaukee Case.* The power delegated to the commissioners is not a legislative power in the constitutional sense, but *quasi*-judicial. *Brown v. Oneida Co.* 103 Wis. 149, 79 N. W. 216; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797; 1 Cooley, Taxation, 786, and cases cited. True, there is conflict in the decisions of courts upon this subject, but the weight of authority and better reason appear to support the doctrine that the power delegated to such boards to equalize taxes is in its nature *quasi*-judicial and not legislative. The commissioners make an examination of the property throughout the county, subpœna and swear witnesses, take testimony, and in general conduct the hearing after the usual manner of a judicial hearing.

3. It is insisted that the act is unconstitutional because it contravenes sec. 1, amendm. XIV, Constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention is that no sufficient notice was given to the taxpayers. This contention cannot be sustained. The board acts upon the different municipalities in the county, not upon the individual taxpayers; hence no notice to taxpayers is necessary. *Spalding v. Hill,* 86 Ky. 656, 7 S. W. 27; 1 Cooley, Taxation (3d ed.) 786; *State Railroad Tax Cases,* 92 U. S. 575, 609. Some of the cases cited by counsel on this point are cases of special assessments against property owners for local improvements, where the courts hold that such assessments can be sustained only upon the theory that lands upon which they are laid are specially benefited thereby, while others are cases not relating to the taxing power at all, and, so far as we can discover, have no bearing upon the question here.

4. It is also claimed that the statute denies to the taxpayer

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the "equal protection of the laws," and thus violates the federal constitution. We think it very clear that this position is untenable. *Bittenhaus v. Johnston,* 92 Wis. 588, 66 N. W. 805; *Hayes v. Missouri,* 120 U. S. 68, 71, 7 Sup. Ct. 350.

5. It is further contended that the act is unconstitutional because it imposes nonjudicial powers upon the circuit judge. We think little need be said upon this subject. The appointing power of courts was recognized and approved and held not to be the exercise of legislative power in *In re Incorporation of North Milwaukee,* 93 Wis. 616, 67 N. W. 1033, and this doctrine seems to be well supported by authority. *People ex rel. Rhodes v. Fleming,* 10 Colo. 553, 16 Pac. 298; 17 Am. & Eng. Ency. of Law (2d ed.) 717; 6 Am. & Eng. Ency. of Law (2d ed.) 1060; *Russell v. Cooley,* 69 Ga. 215; *Walker v. Cincinnati,* 21 Ohio St. 14; *Ross v. Board of Freeholders,* 69 N. J. Law, 291, 55 Atl. 310. The power of circuit courts to appoint commissioners under the act in question has been heretofore recognized in this court, though perhaps not directly passed upon. *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777; *Outagamie Co. v. Greenville,* 77 Wis. 165, 45 N. W. 1090; *State ex rel. Manitowoc v. County Clerk,* 59 Wis. 15, 16 N. W. 617; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797.

6. It is further insisted that there is "no power to tax for this purpose," that the statute is void because unworkable, and that part of the tax has been paid. We think what has been already said fully answers this contention, and that it is unnecessary to prolong discussion under this contention.

7. It is also insisted that the repeal of the law extinguished the right to further proceed in the matter, and authorities are cited to the effect that, where the right is created by statute, the right of action as well as the action itself must be saved by the repealing act. The statutes in question were repealed by ch. 474, Laws of 1905, but a saving clause was inserted to the effect that any pending proceeding should proceed to final

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determination the same as if the act had not been passed. The repeal of the statute, however, cannot affect the present proceeding, because the commissioners had fully performed their duties and made their determination before the repeal. The functions of the commissioners were performed and their duties ended before the repeal of the law.

We think the court below was right in sustaining the demurrer.

By the Court.—Order affirmed.

BAZELON, Respondent, vs. LYON and others, Appellants.

April 17—May 8, 1906.

Evidence: Secondary evidence: Conclusions: Book entries: Rebuttal: Instructions to jury: Appeal: Immaterial errors: Review of evidence to sustain verdict.

1. Evidence that a letter could not be produced but had been burned or destroyed was sufficient to warrant the admission of secondary evidence of its contents.
2. Permitting plaintiff's husband to testify that she did not owe defendants anything is *held*, in view of other testimony, not to have been prejudicial error, although the question called for a conclusion.
3. Permitting plaintiff's husband to testify that before paying for them he wished to examine goods shipped by defendants to plaintiff, because he "wouldn't trust" defendants, is *held*, in view of other testimony, not to have been prejudicial error.
4. To render book entries admissible in evidence under sec. 4189, Stats. 1898, the preliminary proof required by that section must be made.
5. It was competent to permit a witness (plaintiff's agent) to testify on rebuttal as to whether or not he wrote a letter at a certain time which a witness on the other side attempted to show he had written at that time.
6. In an action to recover the amount paid for goods which had been returned to the defendants, it being undisputed that the amount

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was due to plaintiff unless she had received credit therefor, it was not error to refuse to instruct the jury that the burden was upon plaintiff to show by a preponderance of the testimony and with reasonable certainty that defendants were indebted to her.

7. A statement in the charge that "the goods did not correspond with the order and were returned" is *held* not a prejudicial error although the evidence on that point was conflicting, the only contested issues being whether plaintiff had received credit for the goods so returned and whether defendants were entitled to anything on their counterclaims.

8. Where there is any credible evidence to support the verdict, the ruling of the trial court sustaining it will not be disturbed on appeal.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an appeal from a judgment in favor of the plaintiff for the sum of $34.30. The claim set up in the complaint is for money had and received on account of money paid to the defendants for goods which were returned. The defendants answered denying generally the allegations of the complaint, and set up three several counterclaims amounting in the aggregate to $139.64. The gist of the several counterclaims is that the defendants at different times, at the instance and request of the plaintiff, shipped to her several bills of goods, which she refused to receive and which were returned, in consequence of which breaches of contract on the part of the plaintiff the defendants sustained damages in the aggregate amount specified in the answer. The jury found in favor of the plaintiff for the amount claimed, $34.30, and disallowed the defendants' counterclaims. Judgment was rendered in favor of the plaintiff, from which this appeal was taken. Numerous errors are assigned by the appellants which will be briefly considered.

For the appellants there was a brief by *Luse, Powell, deForest & Luse,* and oral argument by *L. K. Luse.*

For the respondent the cause was submitted on the brief of *Henry C. Wilson.*

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KERWIN, J. 1. Error is assigned because the court permitted the witness Bazelon to testify to the contents of a letter which he claims to have received from the defendants, upon the grounds that the original should have been produced or a proper foundation laid for secondary evidence of its contents, which had not been done. We think the testimony sufficient to warrant the introduction of secondary evidence. There was evidence to the effect that the letter could not be produced—that it had been burned or destroyed. Besides, it does not appear to be seriously disputed that a copy of the missing letter produced and appearing in the record is a true copy. We think there was no prejudicial error in the admission of the evidence under this assignment of error.

2. Error is assigned because the court permitted the witness Bazelon to testify that his wife did not owe Lyon Bros. anything, on the ground that the question called for a conclusion. Conceding that the question was not strictly proper, in view of the testimony developed in the case upon this subject we think no prejudicial error was committed in overruling the objection to it.

3. Counsel also asked the witness Bazelon the following question: "Why did you make this request of looking the goods over before you paid?" An objection to this question was overruled, and the witness answered: "I wouldn't trust them, Mr. Wilson, I wouldn't trust them people." This ruling is also assigned as error. In view of other testimony in the case respecting the dealings between the parties, it does not seem that this answer could have prejudiced the defendants.

4. It is assigned that the court erred in excluding book entries and certain exhibits presented. These entries were offered under sec. 4189, Stats. 1898, and in order to make them admissible it was necessary to comply with the provisions of the statute. This statute makes it necessary to prove either by the testimony of the person who made the entries,

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or, if he be beyond the reach of a subpœna, to make such proof by any person having custody of the entries and who testifies that the same were made by the person or persons authorized to make them, in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. A careful examination of the testimony convinces us that these provisions of the statute were not complied with. Hence the court was right in excluding the evidence. *Milwaukee T. Co. v. Warren,* 112 Wis. 505, 87 N. W. 80; *Kelley v. Crawford,* 112 Wis. 368, 88 N. W. 296.

5. It is also insisted that the court erred in its rulings respecting a letter and envelope offered containing written order, together with remarks made by the court in the presence of the jury regarding the same. The error assigned seems to be directed particularly to the remarks of the trial judge. These exhibits were first ruled out, and, after considerable discussion between the court and counsel and additional evidence offered, they were finally admitted. Without going into a discussion of the remarks made by the court, of which complaint is made, we are unable to see that they could have prejudiced the jury. *Owen v. Long,* 97 Wis. 78, 72 N. W. 364.

6. Nor do we think any prejudicial error was committed on the cross-examination of the witness Ficklen, complained of. It was competent to permit the witness Bazelon on rebuttal to testify as to whether or not he wrote the letter during the year 1902 which Ficklen attempted to show he had written at that time.

7. Error is assigned because the court refused to give the following instruction requested by defendants:

"The burden of proof is upon the plaintiff to show that the defendant is indebted to her, and, unless this is shown by a preponderance of the testimony and with reasonable certainty, your verdict should be for the defendant."

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We think no error was committed in the refusal to give this instruction. The action was brought to recover $34.30 paid for goods returned. It was undisputed that this bill of goods had been returned. Therefore this amount was due to the plaintiff, unless she had received credit therefor.

8. It is also insisted that the court erred in its charge to the jury. We have carefully examined the charge and think all disputed matters were fairly submitted to the jury. It is claimed that the statement, "The goods did not correspond to the order and were returned," was error, on the ground that the evidence was conflicting upon this point. But the goods were in fact returned and accepted by the defendants, and the only contested issues were whether the plaintiff got credit for the goods so returned, and whether defendants were entitled to any amount on their counterclaims. These questions were fairly submitted to the jury. *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470, 67 N. W. 16, 1132.

9. It is also insisted that there was not sufficient evidence to support the verdict. Where there is any credible evidence to support the verdict this court will not disturb the ruling of the trial court sustaining the verdict. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57. The case seems to have been fairly tried upon the merits, and the judgment should not be reversed, unless we can see that error was committed which prejudiced the defendants. *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816.

We discover no reversible error in the record.

By the Court.—The judgment of the court below is affirmed.

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HURST, Respondent, vs. WEBSTER MANUFACTURING COMPANY, Appellant.

April 18—May 8, 1906.

Trial: Verdict: Interest: Logs and lumber: Evidence: Scale bill: Estimate: Striking out: Further instructions to jury after retiring must be in open court.

1. Where plaintiff, if he recovered at all, was entitled to recover interest from the commencement of the action, and under the charge the jury could not have included such interest in their verdict, it was not error to add such interest to the amount of the verdict.
2. Where a lumber inspector measured about one third of a quantity of logs, averaged the result, and multiplied such average by the whole number of logs, such process did not constitute "a scalement or measurement" of the logs, within the meaning of sec. 1735, Stats. 1898, and no official scale bill could be based thereon.
3. A scale bill certified by the inspector, which had been received in evidence, was properly stricken out when it appeared that it was based upon an estimate made as above described; but it was error for the court afterwards to refer to it as a scale, telling the jury the quantity shown by it, and stating that it was for the jury to determine whether it was technically a scale. The facts being undisputed, it was for the court to determine whether it was technically a scale.
4. The oral testimony of the inspector as to the number of feet in the logs so measured and estimated should also have been stricken out, there being no evidence that those estimated would average the same as those measured, or that a correct estimate could be made in that way.
5. No communication should be had between the judge and jury after the submission of the cause except in open court. The presence of counsel is not indispensable, but it is the better practice to procure such attendance.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action to recover the balance of the purchase price of a quantity of hardwood logs sold by the plaintiff to the defendant. The complaint alleges the delivery of 255,017

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feet of logs at the agreed price of $12 per thousand; admits the payment of $2,057.31; and prays judgment for a balance of $1,002.89. The answer alleges delivery of only 202,730 feet of elm and ash logs at the agreed price of $12 per thousand, and 370 feet of maple logs at $11 per thousand, and admits payment of $2,057.31, and that there is a balance due of $379.49, for which amount judgment was tendered but not accepted.

The number of logs sold and delivered was admitted to be 2,145, but the dispute was as to the number of feet contained in them. The evidence showed that the logs were delivered by plaintiff at defendant's yard in January and February, 1905; that the defendant had them scaled as they came into the yard by two men, one of whom scaled 1,102 logs aggregating 105,120 feet, and the other 1,043 logs aggregating 97,980 feet, making a total of 203,100 feet. Statements of the result of these scales were sent to the plaintiff, who thereupon employed Timothy Atkinson, district scaler for the district, to scale the logs. Atkinson commenced scaling about March 1st, assisted by one Doe as tallyman. The logs were in a number of large piles in the defendant's yard. Atkinson testified that he and Doe went along the piles measuring the small ends of the logs as high as they could reach, and putting down in a book the number of feet in each log; that he then went on top of the piles and called off the diameters and number of feet of the logs on top, and Doe put down the amounts as he called them; that in this way they actually measured 784 logs, and these logs so measured averaged 119 feet each, which number he multiplied by the number of logs to get the total. Atkinson made a certificate of this scalement, which was offered and received in evidence, showing a total of 255,017 feet. At the close of the evidence this scale bill was stricken out. There was testimony tending to show that no accurate scale of the logs could be thus made.

After the commencement of the action the defendant noti-

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fied the plaintiff that it would have the logs removed and rescaled as they were repiled, and offered to allow the plaintiff to have a scaler present on his behalf. The plaintiff did not accept this offer, but the rescaling was done, and the scaler testified that as a result of the rescale he found 117,780 feet only.

The jury returned a verdict for the plaintiff for $688.76, to which interest amounting to $8.45 from the commencement of the action was added, and judgment entered, and the defendant appealed.

The cause was submitted for the appellant on the brief of *H. V. Gard.*

W. P. Crawford, for the respondent.

WINSLOW, J. The errors assigned will be considered under three heads.

1. It is claimed that there was error in adding interest to the amount of the verdict from the time of the commencement of the action. This depends upon whether interest was included in the verdict as rendered. Referring to the charge of the court, we find that the jury were specifically instructed to "determine the amount of ash and elm delivered, and multiply that amount by twelve, the price per thousand feet," and deduct therefrom the payments, viz., $2,053.24 (not including $4.07 which was paid for maple and was not in dispute), and return a verdict for the balance. From this it appears that the jury could not have included any interest under the terms of the charge, and, as plaintiff was entitled to recover interest from the time of the commencement of the action if he recovered at all, there was no error in adding interest to the amount of the verdict as was done.

2. It appeared that Timothy Atkinson, on whose testimony the plaintiff relied to prove his claim, was, at the time he made his alleged scale of the logs in question, inspector of logs and timber for the district where these logs were located.

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After testifying that he made a measurement and scalement of the logs in March, 1905, he stated that he made a certificate of his scalement and gave the same to the plaintiff, and the certificate so made and identified by him was offered and received in evidence. He afterwards testified as to the manner of making the scalement, showing that he in fact measured but 784 of the logs and averaged the result, and multiplied the whole number of logs by the average so obtained, and thus obtained his total. At the close of the testimony the defendant moved to strike the certificate from the evidence, and also moved to strike out all of Atkinson's evidence as to the number of feet in the logs. The court struck out the certificate, but refused to strike out Atkinson's evidence; and when plaintiff's counsel again offered the certificate simply as a memorandum of the quantity of lumber found by the scaler the court said: "It may be stated that Mr. Atkinson's scale of the logs in question showed that they contained 255,017 feet." Defendant's counsel then excepted to the use of the word "scale," and the court replied: "The jury understands what I mean when I say scale, *and it is for the jury to determine whether this was technically a scale.* I think it appears in the testimony, but to guard against the possibility of it not so appearing I will allow it to be stated now that Mr. Atkinson's measurement was 255,017." Exception was taken to this statement by the defendant.

Our statute (sec. 1735, Stats. 1898) requires each lumber inspector, at the request of the owner of logs, timber, or lumber, "after a scalement or measurement" thereof, to make a bill stating the number of logs and number of feet contained therein, and at whose request scaled or measured, and enter a copy thereof on the books of his office, and give a certified copy of the bill to the owner, which shall be presumptive evidence of the facts contained in it and of the correctness of the scalement in all courts except in favor of the inspector himself. The certificate in question conforms in substance

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to the requirements of the statute, and was doubtless correctly received in evidence when it was first offered, because the inspector had then testified simply that he made a scale and measurement of the logs and a certificate thereof. Presumptively the measurement had been duly made; at least, there was nothing at that time to show to the contrary. When it appeared by the testimony of the inspector himself, however, that he had in fact scaled or measured only 784 out of 2,145 logs, and had averaged the logs so scaled, and multiplied that average by the whole number of logs to obtain the result embodied in the certificate, the certificate must be held to have been completely impeached, and it was the court's duty to strike it from the evidence. Such a process cannot be considered as constituting "a scalement or measurement" of logs within the meaning of sec. 1735. It was at best a mere estimate, and the section does not authorize the making of an official scale bill out of an estimate. But while the court correctly struck it out, he said in the presence of the jury, "The jury understands what I mean when I say scale, and it is for the jury to determine whether this was technically a scale," and then told the jury that Mr. Atkinson's measurement was 255,017. Thus, while the certificate was nominally stricken out, the jury were told what its amount was, and that they were to determine whether it was technically a scale. Presumably this means technically a scale under sec. 1735, and we are unable to see how this ruling can be justified. The court was to determine (the facts being undisputed) whether it was technically a scale, and to leave it to the jury to determine simply reverses the ruling by which it was stricken out.

We think, also, that the motion of the defendant to strike out Atkinson's oral testimony as to the number of feet in the logs should have been granted. He had actually measured in a loose way about one third of the logs; we do not find that he testified that the third which he measured were in

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his judgment an average third, or that the unmeasured two thirds would average the same as the third which he measured; nor did he testify as an expert that a correct estimate of a quantity of logs could be made in that way. It would require some evidence of this nature to entitle his testimony to be received even as an estimate. This is not a case where the logs had been manufactured or disappeared, and where the only evidence obtainable necessarily must consist of estimates from stumps or the like; but every log was present and *in esse*. On the evidence as it stands, the supposed estimate of Mr. Atkinson did not rise beyond the dignity of a guess or conjecture.

3. The record shows that, after the jury had been deliberating for some time on their verdict, they sent a written request to the judge that they might have the pleadings and papers in the case. Thereupon the judge, in the absence of the parties and their counsel, went to the jury room and, standing in the open doorway, told the jury he could not grant their request, but would inform them concerning any undisputed figures or amounts, and in reply to questions told the jury the number of feet claimed by the plaintiff and admitted by the defendant, and the amount of the payments made. This conduct of the judge is assigned as error, and we are compelled to agree with this contention. The subject of such communications to the jury has been recently fully considered by this court in the case of *Havenor v. State,* 125 Wis. 444, 104 N. W. 116, and the rule laid down that no communication should be had between the judge and the jury after submission of the cause except in open court. The presence of counsel is not indispensable, although it is the better practice to procure such attendance. *Meier v. Morgan,* 82 Wis. 289, 52 N. W. 174. But whether counsel be present or not, if the jury are to be further instructed they should be brought into open court. The rule is strict, but salutary. All court proceedings should be in the open; there should be no

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opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial. He is entitled to have his case tried in open court from start to finish. There is safety in no other rule.

We have found no other points which are deemed worthy of discussion.

By the Court.—Judgment reversed, and action remanded for a new trial.

LEONARD, by guardian *ad litem*, Respondent, vs. PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

April 18—May 8, 1906.

Life insurance: Revival after lapse: Contract construed: Negligent delay of insurer: Secret inquiry: Failure to notify assured of denial: Estoppel.

1. A life insurance policy provided that, in case of lapse for nonpayment of a premium, it would be revived at any time within two years upon written application and payment of arrears, provided evidence of the insurability of the assured, satisfactory to the company, were furnished. *Held*, that an assured applying for such a revival did not stand in the same position as an applicant for a policy in the first instance, but had a contract right to the revival upon the specified conditions.
2. The company in such a case was bound to act reasonably and with fairness to the assured. It had no right of arbitrary refusal, or right to act upon information secretly obtained without opportunity for the assured to meet it.
3. The company was bound, also, to act with reasonable promptness in passing upon an application for revival, and if the result was unfavorable to notify the assured.
4. A policy containing such provision for revival after default did not, nor did any custom, require the issuance of a revival receipt. After the assured, applying for a revival, had submitted to a medical examination to show his insurability, the company's

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examiner negligently failed for thirty days to send in his report, and the company thereafter failed for six weeks to pass upon the application, making in the meantime a secret inquiry as to the habits of the assured, and then, after denying the application, failed to give notice of such action to the assured or any one representing him until some days after his death, which occurred about seventeen days after such denial. *Held*, that the company was estopped to assert that the policy had not been revived.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to recover on a policy of life insurance.

The complaint contained a statement of facts necessary to recover on a $1,000 policy issued by the defendant on the life of Thomas Bertram Leonard, for the benefit of the plaintiff. These facts, among others, were alleged: The policy was issued July 8, 1902. The annual agreed payment was $26.55. It was required to be paid on the 8th day of July in each year till the contract matured. The assured died January 28, 1905. He failed to make the payment for 1904 till October 26 of that year. On that date he made his payment, together with $1.40, being the interest and charges required under the contract to secure a continuance of the policy, notwithstanding the default, in case of his furnishing satisfactory proof of his being an insurable risk. He furnished such proof. The payment was made and received unconditionally. The money was retained by defendant without notice to the assured of any decision not to restore his policy. No offer to return the money or such notice occurred till after the assured died. There was ample time for the defendant to have made such offer and given such notice prior to such death, subsequent to its obtaining full knowledge of all facts material for it to know in passing on the question of whether the policy should be continued notwithstanding the default. By reason of such failure such default was waived, and the policy in accordance with the contract of

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insurance revived and continued. The provisions in the contract in that regard were as follows:

"If this policy be lapsed by nonpayment, it will be revived any time within two years after the due date of such premium, as specified on the first page hereof, upon written application and payment of arrears of premium, with interest at the rate of five per cent. per annum, provided evidence of insurability of the insured, satisfactory to the company, be furnished. Application for revival after two years from such date will receive equitable consideration."

"If any premium be not paid when due, this policy shall be void, and all premiums forfeited to the company, except as herein provided."

"If this policy, after being in force two full years, shall lapse for the nonpayment of premiums, the company will continue in force the insurance under the policy for 120 days from the date of such premium."

The defendant answered, defensively, as follows: The assured failed to pay the premium due on his policy for 1904, when the same fell due, July 8th of that year, or thereafter though he survived such due date over six months, whereby the policy became forfeited by its terms. After the forfeiture it was not revived or continued. October 2, 1904, the assured applied for a revival of his policy, depositing with the defendant's duly authorized local agent the sum of money alleged in the complaint as having been paid. The money was received upon condition that the application should not be granted until the defendant should formally approve it, in the lifetime and during the good health of the assured, which condition he understood and agreed to. Evidence satisfactory to the defendant, of the insurability of the assured, was not furnished it, and upon due consideration of the matter the application was rejected and the deposit returned.

Upon the trial, proof was made as follows: The assured made application in the form required by the defendant for a continuation of his policy, paying defendant the full amount of money required for that purpose, the same being received

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by defendant's duly authorized agent, and kept by the agent as a special deposit. The application was, in part, in these words:

"I, the undersigned, hereby declare and warrant that I am of sober and temperate habits, and that I am in good health and have been in good health since the date of the issue of my policy. I hereby request the policy, which was lapsed for the nonpayment of the premiums, to be reinstated, and to that end tender the arrears to the company, with interest at five per cent. per annum, with the understanding that the policy, to the conditions of which I hereby agree, will not be in force until the company has, during my lifetime and good health, approved this application. I agree to accept a return of said arrears and interest should the company decline, for any reason, to approve this application."

For proof of his insurability, assured was required to submit to an examination by the defendant's medical examiner, and show thereby that he was insurable. He did in the early part of November, 1904. The examiner neglected, without reasonable excuse, to make his report, which it was his duty to do, to the defendant, for a period of some thirty days. He then re-examined the assured, and made his report in the form required by the company, which was to the effect that the assured was in good health and safely insurable. The report, application, and agent's certificate of payment of arrears were sent to the defendant's head office, and brought to the attention of its medical director early in December aforesaid. Thereafter no notice of any action on the application was given to the assured. It was not finally acted upon till about January 11, 1905. Immediately thereafter notice that it had been denied was given to the local agent, but he did not give notice thereof to the assured, or to any one representing him, till some days after the death occurred. The rejection of the application was not based on any defect in the evidence furnished by the assured, but on the result of a secret inquiry conducted by defendant. The source of its in-

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formation, whether reliable or not, was not shown upon the trial. The purport thereof, as claimed by the defendant, was that the assured was intemperate. There was no proof offered by defendant that the statements in the application and the medical examiner's report, or any of them, were untrue, nor any proof that in case of the continuance of a policy under such circumstances as those stated any notice to the assured was required or customarily given.

At the close of the evidence, the court, on motion, directed the jury to render a verdict in favor of the plaintiff, in accordance with the prayer of the complaint.

For the appellant there were briefs by *W. M. Bowe,* attorney, and *Durment & Moore,* of counsel, and oral argument by *E. S. Durment.* They cited *Behling v. N. W. Nat. L. Ins. Co.* 117 Wis. 24; *Chamberlain v. Prudential Ins. Co.* 109 Wis. 4; *Brink v. Merchants' & F. U. Mut. Ins. Asso.* 17 S. Dak. 235, 95 N. W. 929; *Conn. Mut. L. Ins. Co. v. Rudolph,* 45 Tex. 454; *Kohen v. Mut. R. F. L. Asso.* 27 Fed. 705; *Misselhorn v. Mut. R. F. L. Asso.* 30 Fed. 545; *Rose v. N. Y. L. Ins. Co.* 124 N. C. 395; *McDonald v. Provident Sav. L. Assur. Soc.* 108 Wis. 213; *More v. N. Y. B. F. Ins. Co.* 130 N. Y. 543; *Royal Ins. Co. v. Beatty,* 119 Pa. St. 6; *Harp v. Grangers' Mut. F. Ins. Co.* 49 Md. 308.

For the respondent there was a brief by *T. J. Connor,* and oral argument by *H. B. Walmsley.*

MARSHALL, J. The appeal must be tested by the plain obligations of the insurance contract, and a few—perhaps but one—very familiar principles of law.

The failure of the assured to pay the 1904 premium, due July 8th of that year, did not work a forfeiture of the policy. It caused, what is termed in the policy, a "lapse:" the commencement of a period of two years during which it still possessed such vitality that, had death occurred within the first 120 days thereof, the appellant would have been liable for the

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full amount stipulated in the policy; and that for the full term the assured, had he lived, was entitled, as matter of contract right—a right bought and paid for, a right as fixed and certain as any other obligation incurred by the appellant or secured by the assured,—to have the policy fully restored upon his paying the arrears of premiums, with interest at the rate of five per cent. per annum, and furnishing appellant evidence of his insurability satisfactory to it.

So the relations between the parties to the insurance contract when the assured made his application to revive the same were not, by any means, the same as those between an applicant for a policy in the first instance, and the company applied to, as appellant's counsel contend. In the latter, the application could be rejected at the pleasure of the company; the attitude of the applicant being that of one offering to take from another that which such other is not under any legal obligation to deliver. In the case in hand the attitude of applicant was that of one demanding a right which, upon the conditions precedent in the contract to its ripening into a complete obligation, it was not within the power of appellant to successfully withhold.

When the application was made in due form, the arrears paid, the examination by appellant's medical examiner submitted to, and the case fully made up so far as the assured was concerned for action by appellant, the latter was bound by the contract, by necessary implication, to pass upon the matter within a reasonable time, and if the result was unfavorable to notify the assured. Since the result of the examination by appellant's instrumentality in that regard was in every way favorable to the assured, he had a right to assume, not hearing to the contrary, that his evidence of insurability was satisfactory. There was no provision in the contract for the issuance of a revival receipt, nor was there any custom to issue such evidence so far as the record shows. The evidence indicates that the procedure for a revival was

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(1) to make a written application, using a printed form furnished by the appellant, (2) to submit to an examination by the latter's medical examiner, the result to be certified thereto by him in accordance with its furnished form, (3) the making of the necessary payment of arrears and charges to the local agent, whose duty it was to certify the fact in that regard, using a printed form likewise furnished for that purpose. These three instruments, showing upon their face the facts entitling an assured to a revival of his lapsed policy according to the method of doing business which appellant adopted and required, close a case ready for the latter's consideration.

The case here was thus fully closed, as appears, and placed in appellant's possession about December 2, 1904. It would have been so closed and placed about one month earlier but for the inexcusable negligence of appellant's medical examiner, for whose default it is responsible. The record thus made, on its face, as is in effect confessed, showed every essential to a continuation of the policy subject to appellant's approval.

In considering the case so made, appellant was bound to act reasonably. The agreement to restore the policy upon specified conditions, when they were satisfied according to the prescribed procedure, wanting only appellant's judgment upon the record made, carried with it, by necessary implication, the obligation to act reasonably and with fairness to the assured. Appellant had no right of arbitrary refusal, or right to act upon information secretly obtained without opportunity for the assured to meet it. Such a course was contrary to the letter and spirit of the insurance contract. The company was entitled to be satisfied of the insurability of the applicant before restoring the policy, but it had no right, by proceedings outside of anything contemplated by the contract, to create dissatisfaction. When in all reason it ought to have been satisfied or to have notified the assured to furnish further evi-

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dence, it was bound to be satisfied or to so notify him. It was also bound by contract, as well as in good morals, to act with some reasonable degree of promptness.

Life insurance has come to be deemed so essential to security of the family, in case of the bread-winning member thereof being removed, that for an insurance company, which is continually inculcating that idea, to permit one to sleep upon the faith of an existing contract of insurance with it when there is none in fact, is a grievous wrong. For appellant in this case to remain silent, as it did for weeks, knowing or having good reason to know that the assured supposed his contract had been restored, and in the meantime to pursue a secret investigation and then act upon information thus obtained without opportunity for the assured to meet it, was contrary to the plainest principles of justice, and wholly outside of anything that could reasonably have been in contemplation of the parties when the policy was issued. The contract right to a renewal of the policy upon condition, by necessary implication, carried with it the right to have the proceedings for compliance with such condition treated according to common principles of fairness.

The implied obligation of appellant to act with reasonable promptness in passing upon the application for a renewal of the policy was clearly breached by negligence of its medical examiner in failing to send in his report for some thirty days after the examination and negligence of the appellant in failing to pass upon the case made for some six weeks after receiving the proofs. The implied obligation of appellant to notify the assured of its adverse action within a reasonable time after it occurred, and to return the money paid to it for the renewal, was clearly breached by failure to bring the matter to the attention of the assured during the seventy days he lived after such occurrence.

Appellant's silence for some two months after an apparently perfect case for revival was submitted, precluded it, on

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principles of *estoppel in pais,* from subsequently being heard to the detriment of the beneficiary. He who remains silent when in justice to another he ought to speak, will not be heard to that other's prejudice when he subsequently breaks such silence, is a rule of equity that applies very clearly to the facts of this case.

The case is one so clearly ruled on familiar principles applicable to contracts of insurance, construed as was evidently intended in this case, that we have reached the conclusion indicated, without any such call for the citation of authorities by way of illustration as to warrant referring thereto. The array of authorities pressed upon our attention by counsel for appellant, dealing with original applications for insurance, are doubtless right as regards the facts with which they deal, but they are entirely unsuitable as guides in reaching a proper decision in this case. Here there was a contract of insurance in part, as has been said, when the application for revival was made. It had been paid for, and as to the right of restoration it was in full force when the assured's case in that regard was submitted for consideration. It cannot be characterized otherwise than a fraud upon the latter and his beneficiary, to go outside such case and act adversely thereto upon information stealthily obtained, giving no opportunity to be heard in opposition thereto, and then to remain silent till the death of the assured, though there was ample time to have acquainted him with the facts days and weeks prior thereto. Such conduct is so out of harmony with the theory and spirit of life insurance contracts, and so contradictory to the attitude uniformly assumed by life insurance companies in soliciting patronage, as to be manifestly outside of anything contemplated by both parties to the policy in question. It cannot receive favorable consideration at the bar of justice.

By the Court.—Judgment affirmed.

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IVES, Administratrix, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

April 18—May 8, 1906.

Railways: Injury to sectionman: Assumption of risk: Unlawful and unusual speed of train: Giving of signals: Positive and negative testimony: Immaterial evidence: Orders of foreman.

1. Sectionmen upon railroads assume the risk of trains of all sorts, regular or "wild," running over the tracks at all times and at such rates of speed as are attainable, without notice or warning except such as results incidentally from the ordinary noises of the train, including such bell and whistle signals as are customary.
2. Such rule applies to trains running at unlawful speed within the limits of a city, where the sectionmen, knowing such unlawful speed to be customary, accept and continue in the employment subjecting them to peril from such practice.
3. The fact that the particular train which injured a sectionman was a freight train running at a greater speed than such trains ordinarily maintained at the place and under the circumstances in question, did not show that the risk was not one assumed by him under the rule.
4. The positive testimony, based upon positive recollection, of conductor, engineer, and fireman, all of whom were upon the engine, that the bell and whistle were sounded as they approached a highway crossing, was sufficient to establish that fact conclusively, as against the testimony of a section foreman, who was approaching from the opposite direction on a railroad velocipede, that he heard neither whistle, bell, nor roar of the approaching train, but who further testified that the ringing noise made by the velocipede made it difficult to hear other sounds.
5. There being conclusive evidence that the bell and whistle on an engine were sounded at a crossing just before a sectionman was struck and injured, testimony as to how far such sounds could be heard was immaterial.
6. The fact that a sectionman was proceeding along the track under the orders of his section foreman did not relieve him from his assumption of the peril of passing trains, of which the foreman had no superior knowledge.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

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Action by plaintiff to recover for the death of her husband, caused by alleged negligence of the defendant. Decedent was a section hand employed by defendant and had had several months' experience in that employment. About 7 o'clock in the morning he, together with another section hand and the section boss, and at the direction of the latter, started in a dense fog eastward from Stanley to go to their work at the next station, riding on a railroad velocipede. They heard a passenger train come into the station from the east, but knew they had plenty of time to reach a road crossing about three quarters of a mile from the station before that train would leave. They also knew and spoke of the possibility of a freight train, No. 29, arriving to meet the passenger, the freight being then nearly half an hour overdue. They progressed at the rate of about four miles an hour to within approximately 200 feet of the road crossing, when suddenly the freight train was seen through the fog approaching them at a distance of 300 or 400 feet. They stopped the velocipede as quickly as possible, one sectionman jumped to the north side of the track, and the decedent, who was seated on the bicycle between the rails, attempted to go to the north side of the track, but evidently just failed to escape the engine, some portion of which struck him on the head and shoulder, causing death. The train was running rapidly, about twenty-five miles according to its engineer, and about forty miles per hour according to the section boss. The road crossing mentioned was the eastern limit of the city of Stanley, so that the place of injury was within those limits where a speed of more than fifteen miles per hour is prohibited by law. The sectionman heard no whistle or bell rung before the crossing, but the train crew all testified positively to the blowing of the whistle and the sounding of the bell. The section boss testified that the rattle of the velocipede would seriously embarrass, if not prevent, him from hearing such sounds. It was customary for trains to run at high rates of speed through the

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yards at Stanley, which deceased had for months abundant opportunity to observe. The evidence tended to show that train No. 29 was running faster than was usual for such a train.

At the close of the evidence the court directed a verdict for the defendant on the ground that deceased had assumed the risk from which his death had resulted. From judgment on such verdict the plaintiff appeals.

For the appellant there was a brief by *W. H. Frawley* and *H. B. Walmsley,* and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Howard Morris* and *Thomas H. Gill,* and oral argument by *Mr. Gill.*

DODGE, J. The case of *Hinz v. Chicago, B. & N. R. Co.* 93 Wis. 16, 66 N. W. 718, adopting the views expressed in *Pennsylvania R. Co. v. Wachter,* 60 Md. 395, declares the rule that sectionmen upon railroads assume the risk of trains of all sorts, regular or "wild," running over the tracks at all times and at such rates of speed as are attainable, and that, too, without notice or any warning except such as results incidentally from the ordinary noises of the train, including, of course, such bell and whistle signals as are customary. Plaintiff's decedent met his death from such a risk. Nonliability is the legal conclusion from that situation.

Appellant seeks escape from that result, first, by reason of the fact that the accident occurred within the limits of a city where a speed greater, certainly, than fifteen miles per hour, perhaps than six miles, was prohibited by law. However reprehensible, and therefore negligent, such lawlessness may be, yet the breach of the law results in no liability to one who, knowing it to be a custom of the company in the management of its business, accepts and continues in an employment exposing him to peril from such practice. *Abbot v. McCadden,* 81 Wis. 563, 51 N. W. 1079; *Williams v. J. G. Wagner Co.* 110 Wis. 456, 86 N. W. 157; *Kreider v. Wis. River*

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P. & P. Co. 110 Wis. 645, 657, 86 N. W. 662. That defendant was accustomed to run its trains through the city of Stanley at full speed without regard to the legal limit, and that deceased knew it, was undisputed, indeed proved by the only eye-witness of the tragedy whom plaintiff called. Hence the fact that the speed of the train in question was illegal is of itself without significance.

Another contention of appellant is that this train was running at a speed greater than freight trains ordinarily maintained through the city, and especially much greater than that of freight trains approaching the station with the purpose of entering a side track to allow a passenger train to pass, as was that which caused the injury; hence the risk was not a usual one and not assumed. This argument confuses the risk which deceased assumed with considerations of what might constitute other forms of contributory negligence with reference to this particular train. Assuming that he knew that only a freight train was approaching, that it was to take the side track at the switch within a quarter mile to make way for a passenger, there might well be an argument that he was guilty of no negligence with reference to that train in proceeding on the assumption that it would not come upon him at forty miles an hour, but that was not the only risk he assumed. He was bound to anticipate that his employer would use its track to run such trains as any exigency might require; not alone regular freight trains giving way to passenger trains, but specials, freight or passenger, or wild engines, to which right of way might be given over all trains with notice and instructions perhaps to station employees to clear tracks and arrange switches so that no check of speed need occur, but without notice to sectionmen. Such use of tracks by railroad companies is within common knowledge and is usually within the contingencies of the employment which the track walker or the sectionman undertakes. That such was the undertaking of the section workers on defendant's road

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is testified to by the foreman, who says that, independently of regular trains, they were bound to be "expecting any minute a train when you are on the road; got to figure every minute that something comes along;" also that it was the duty of all sectionmen to keep out of the way of trains. There is no suggestion that forty miles per hour is an unknown or even unusual rate of speed for some trains or engines; indeed, common knowledge is to the contrary, and the risk of a train at that speed at any moment which deceased assumed was not varied by the fact that it was unusual for this particular train to run so fast. We can discover nothing in such fact to show that the risk from which decedent suffered was not among those which he must be held to have assumed under the rule of *Hinz v. Chicago, B. & N. R. Co.* 93 Wis. 16, 66 N. W. 718.

Appellant's further argument, that there was a jury issue as to whether the bell and whistle were sounded upon the train upon approach to the highway crossing, and that a departure from custom in that respect would be negligence not within the risks plaintiff assumed, is met in our judgment by respondent's contention that there was no such issue, but that such signals were proved without dispute. It has often been declared that when credible and unimpeached witnesses, having exact and certain knowledge so that they cannot be mistaken, testify affirmatively to the existence of a fact, such testimony is not put in issue by mere negative evidence of persuasive facts which, but for the affirmative evidence, might support an inference against the existence of the material fact; where at least the negative testimony may within reason be true and yet the fact may have existed. *Bohan v. Milwaukee, L. S. & W. R. Co.* 61 Wis. 391, 21 N. W. 241; *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238; *Konkel v. Pella,* 122 Wis. 143, 99 N. W. 453. In the present record is the positive testimony of the conductor, the engineer, and the fireman, all of whom were on the engine, that these sig-

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nals were given, based as they declare on positive recollection. The improbability of any omission on this point is enhanced by the fact that they knew they were approaching another train, and were within a minute of the limit of time at which the operators of that train would have a right to assume that no train would approach from the east and might take some action tending to put one or both trains in peril. The conductor was riding on the engine partly from that consideration. Against this is only the testimony of the section foreman that he heard neither whistle, bell, nor roar of the approaching train, but he at once deprives this of significance by testifying that the velocipede makes a ringing noise on the rails, and replied to question, "Didn't it make so much noise that you couldn't hear the bell of that train or whistle?" "Pretty hard when you are on the car," "on account of the car ringing." "That is a common experience with sectionmen whether with velocipede or handcar." He also testified that he and deceased were conversing; also that he did not hear anything of the other noises of the freight train. Appellant's suggestion that the same witness did hear the whistle of the passenger train behind him at much greater distance is neutralized by the fact that they stopped the handcar in order to listen and thereupon heard it. This state of the evidence also rendered immaterial the trial court's refusal to permit the foreman to testify how far an engine whistle or bell can be heard, even if the questions so framed might be construed as inquiring as to results of the witness's experience and observation, and not for mere opinion. *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 224, 95 N. W. 100.

It is strenuously argued by appellant that, because deceased was on the velocipede by direct order of his superior, he is absolved from any assumption of the risk, or at least that constitutes a new element which necessitates submission of the question to the jury. Doubtless there may be cases where a direct order from one having superior knowledge as to existence of dangers may constitute such an assurance against their

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existence that the subordinate when obeying may be absolved from contributory negligence when otherwise he would not, but, like every other situation where, upon all the evidence, including such direct order, there can in reason be but one conclusion, it is the duty of the court to so rule. Any contention that a direct command from a section boss to his crew to go or be upon the track negatives their assumption of the peril from passing trains the immediate proximity of which is known neither to them or him would effectually emasculate the rule of *Hinz v. Chicago, B. & N. R. Co.* 93 Wis. 16, 66 N. W. 718, for we apprehend that the handcar seldom if ever starts over the track save by such command. In the case on which appellant relies, *Long's Adm'r v. Ill. Cent. R. Co.* 113 Ky. 806, 68 S. W. 1095, the jury question was found not from the command alone, but from numerous facts tending to show ignorance on the subordinate's part of the full risk and such superiority of knowledge by the foreman that the former might well have believed from the command that the danger did not exist. In the case at bar there is not a suggestion of any knowledge either of the general perils or the specific danger on the part of the foreman which was not fully shared by the deceased, and we can discover nothing in the fact that they were proceeding along the open track, away from station grounds, under his orders, to relieve decedent from his assumption of all risks from the ordinary operation of the railroad, including that of a train at high speed.

We are unable to say that the trial court was wrong in concluding that the evidence established conclusively and without opportunity for reasonable difference of opinion or inference, that deceased had full knowledge of the imminence of such perils as that from which he suffered, and that, by accepting and continuing his employment, he assumed the same so that the defendant could not be liable even if negligent in creating the peril.

By the Court.—Judgment affirmed.

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WILL OF MUELLENSCHLADER: TRIELOFF, Executor, Appellant, vs. MUELLENSCHLADER and others, Respondents.

April 18—May 8, 1906.

Wills: Mental capacity: Undue influence.

1. A finding by a jury, approved by the trial court, to the effect that the testator, at the time he executed the instrument in question, had not sufficient mental capacity to make a will, is *held* to be contrary to the clear preponderance of the evidence, which showed that he had sufficient capacity while the instrument was being drawn by an attorney, to whom he gave full directions therefor, and tended strongly to show that he consciously and understandingly participated in the final execution thereof, although his death followed in a few minutes.
2. The evidence (showing, among other things, that a partner of the testator, to whom he bequeathed a considerable sum, had visited the testator frequently during his illness and did so four times on the day of his death, and that such partner had in his possession at the time the certificates of deposit mentioned in the will and the bank book of the testator) is *held* insufficient to create a presumption of undue influence.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

This is an appeal from a judgment of the Rock county circuit court affirming the judgment of the county court, which denied probate to the writing propounded as the will of Herman Muellenschlader, deceased. It appears that the deceased resided in Rock county at the time of his death and left an estate. The writing now propounded as his last will was submitted for probate to the county court. The widow and the guardian *ad litem* of the infant children of the deceased filed objection to its probate upon the grounds that it was not his will, that he was not of sound and disposing mind when it is alleged to have been made, and that, if made and signed by him, it was procured by the undue influence of *Charles Trieloff,* one of the persons named as a beneficiary in the instrument.

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After a trial of the issues before the county court it awarded judgment denying probate to the instrument. Upon appeal from this judgment to the circuit court the issues were tried there by the court and before a jury. In answer to the one question submitted to them the jury found that the deceased was not of sound mind at the time he executed this written instrument. The court made its findings of the facts and refused to probate the instrument as the will of the deceased. Among its findings of fact material to the consideration of this appeal are these:

"9. That it is a peculiarity of peritonitis that the suffering it causes has less effect upon the mental powers, and that persons who die therefrom retain usually their mental faculties longer, stronger, and clearer than in any other disease; that they usually retain consciousness up to a short time before death, and often to the very last; that in the case of the deceased his weakness was such at the time of the making of his mark by him to said instrument, and that his death followed so immediately upon the signing of the instrument by said witnesses, that it is impossible to determine certainly whether deceased was fully conscious of what he was doing when he made said mark, and whether or not he was conscious of the fact of the signing by the witnesses, and for that reason the court approves the finding of the jury.

"10. That the deceased and the legatee, *Charles Trieloff*, were, at the time of the execution of the said instrument offered for probate, copartners and had been such for a number of years prior thereto, and that a confidential relation existed between them as such copartners; that no explanation has been made or suggested as to why the deceased should have given said legatee the legacy specified in said instrument; that said legatee, said *Trieloff*, visited the deceased frequently during his sickness, and was there some four times on the day of his death; that when he was called into the room to assist in determining what the names were, which were in doubt, and the spelling thereof, that he had in his possession, and in his pocket, the several certificates of deposit mentioned in said instrument, and also the bank book belonging to said deceased, and that no explanation has been made

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or offered as to how he obtained possession of the same; that the circumstances surrounding the giving of said legacy by the deceased to said legatee are such as to call upon him for explanation and a showing that the same was a free, voluntary, and intelligent act of the deceased, which has not been done."

The instrument bears date January 26, 1904, the day of the death of the deceased. In this instrument the estate of the deceased is bequeathed as follows: (1) To *Charles Trieloff* $2,000; (2) to his son and daughter, equally, the avails of two certificates of deposit in designated banks amounting to about $3,000; (3) to his wife and these children in equal shares a bequest of property in Weld, Germany, stated to be about $3,500; (4) to his brother Charles, of Janesville, Wisconsin, the amount due his estate from August Marx, stated to be $2,000; and (5) the rest of his property to his wife and two children in equal shares.

It appears that at the time of his death he was engaged in the saloon business in partnership with *Charles Trieloff* and that he had been so engaged for a number of years immediately preceding it. He was about forty years of age. He was taken sick on the 24th day of January, 1904, with intestinal trouble. Dr. Woods was called to attend him and had charge of him. On Tuesday, January 26th, Dr. Woods last saw him at about 11 o'clock in the forenoon, and left him in a condition indicating nothing extraordinary or dangerous. At about 1 o'clock of this day his condition had become worse, and Drs. Palmer and Gibson, being called, found him suffering from peritonitis, which they believed to be incident to a bowel perforation. It was not then deemed advisable to undertake an operation. Dr. Palmer saw him thereafter at about 4 o'clock, when he had great difficulty in breathing. There was more distention in the abdominal region and weaker heart action. His appearance was cyanotic, indicating impaired oxygenation of the blood and causing profuse

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perspiration. These symptoms were accompanied by restlessness, vomiting, and much pain. The doctor had a conversation with him with reference to his property, and he informed the doctor that he had money in banks and some cash in his pocket. In response to the doctor's inquiry as to whether he wanted to make a will he said, "Yes," and upon being told that he had better get a lawyer he replied in the affirmative. In compliance with his wish the doctor caused a lawyer to be called, and Mr. Sutherland, an attorney, soon arrived at the house, and at the deceased's request the doctor also sent for *Mr. Trieloff*. Mr. Sutherland arrived a few minutes after 5 o'clock, and Dr. Palmer informed him that the deceased desired to make a will. In response to Mr. Sutherland's inquiry: "Is this man of sound mind?" the doctor replied, "Yes." Thereupon Sutherland proceeded to write the will. *Mr. Trieloff,* who was then present, left the room at Sutherland's suggestion. The deceased gave Sutherland the names of his partner, *Trieloff,* his wife, children, and his brother, and enumerated his properties, and directed, as specified in the instrument, the amounts and kinds to be given to each. It appears that in doing this he experienced some difficulty on account of his impaired breathing and his suffering and great pain. Dr. Palmer and *Mr. Trieloff,* who was called into the room after a part of the instrument had been written, gave some assistance in correctly getting from the deceased the names of the persons and some foreign places which were to be written in the paper. Each provision was written and read separately, and assented to by him. When the paper had been written it was placed for signature on a book before the deceased, while he was in a sitting posture in bed. On account of his weakness and difficult breathing, upon the suggestion of Mr. Sutherland, he made his mark instead of writing his name, which he requested Mr. Sutherland to do.

Dr. Palmer testified that the paper was then removed, and that Sutherland placed it on a table and wrote, while he, the

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doctor, gave the deceased a hypodermic injection or heart stimulant; that he then observed that he was very weak, and stated, "Mr. Sutherland, the man is going; you will have to hurry," and that Sutherland then pushed the paper to him, saying "Sign here;" that he signed it, and then gave his attention to the deceased; that he is not certain whether Sutherland had signed it; that he did not see him sign it, but that he heard him writing; that the deceased dropped into short breathing, commenced to vomit, and that death followed in a few moments.

Mr. Sutherland and *Mr. Trieloff* testify that before the deceased appended his mark to the paper it was read to him in full; immediately after signing it he spoke to Mr. Sutherland, saying that "no administrator" (meaning executor) had been named, and telling Mr. Sutherland that he wanted *Charles Trieloff* named; when asked by Sutherland who that was, he pointed at *Trieloff*, saying, "It is that man there, my partner;" that he then declared it as read to be his will, and desired Palmer and Sutherland to sign as witnesses; that he was lying in a reclining position in his bed when the witnesses signed it on a table near the bed in his immediate presence and in the presence of each other; that thereupon the paper was folded, and that Sutherland stated to the deceased, "You can have this filed with the county judge, or I will keep it and put it in my safe;" and that he replied, "You keep it."

At the conclusion of Dr. Palmer's evidence on direct examination he states that when the deceased executed the will he was, in his opinion, of sound mind. Sutherland and *Trieloff* testify to the same effect. Upon cross-examination Dr. Palmer states that by a sound mind he meant a mind not diseased; and in reply to a question based on his knowledge he answered that in his opinion the deceased had not sufficient actual memory to collect in his mind, and comprehend without prompting, the condition of his property, his relation to his children and others who might properly be his

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beneficiaries, and to hold these things in his mind sufficiently to perceive their relation to each other, and to form a rational judgment in relation to them. In response to a hypothetical question Drs. Gibson and Buckmaster express the same opinion. Drs. Woods and Pember expressed a contrary opinion on substantially the same hypothesis.

William G. Wheeler, for the appellant.

For the respondent *Anna Muellenschlader* there was a brief by *Fethers, Jeffris & Mouat,* and oral argument by *M. G. Jeffris.* To the point that the law casts upon the appellant the burden of showing that the making of the will was untainted with undue influence and was the intelligent and deliberate act of the grantor, they cited *Davis v. Dean,* 66 Wis. 100, 110; *Cole v. Getzinger,* 96 Wis. 559, 573; *Will of Slinger,* 72 Wis. 22; *Doyle v. Welch,* 100 Wis. 24; *Small v. Champeny,* 102 Wis. 61; *Baker v. Baker,* 102 Wis. 226; *Disch v. Timm,* 101 Wis. 179; *In re Derse's Will,* 103 Wis. 108; *In re Downing's Will,* 118 Wis. 581.

John Cunningham, guardian *ad litem* for *Clara* and *Herman Muellenschlader,* contended, *inter alia,* that as to signing and witnessing testator must be mentally observant of the specific act in progress. *Aikin v. Weckerly,* 19 Mich. 482, 504; *Maynard v. Vinton,* 59 Mich. 139, 150, 151. "In presence of" means conscious presence. *Dunlop v. Dunlop,* 10 Watts, 153; 29 Am. & Eng. Ency. of Law (1st ed.) 175. Testator's mind must hold up to the last. Cassoday, Wills, § 447.

SIEBECKER, J. On its face the paper writing, propounded as the last will of the deceased, presents all the legal formalities requisite to a proper execution of a will, but the circuit court denied probate to it, assigning as one of the grounds "that it is impossible to determine certainly whether the deceased was fully conscious of what he was doing when he signed it (made his mark), or whether or not he was conscious of the fact of the signing by the witnesses." The facts

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established by the evidence are set forth in the foregoing statement of facts. The court evidently concluded that the deceased had the mental capacity and was capable of making a will at the time Mr. Sutherland arrived and conferred with him concerning his property, the provisions of the will, and the persons to whom he wished to bequeath it. The evidence clearly shows that immediately after the arrival of Dr. Palmer on his 4 o'clock visit the deceased conveyed his wishes and instructions concerning this subject to him in a perfectly intelligent and rational manner, indicating clearly that he then had a full understanding and comprehension of this subject. Respondents contend that from the time the doctor saw him at 4 o'clock it is apparent that the deceased was so weakened from pain and suffering, and that his mental strength had so rapidly waned, that he had not "sufficient active memory to collect in his mind, and comprehend without prompting, the condition of his property, his relation to his children and other persons who might be the beneficiaries, and the scope and bearing of his will, and to hold these things in his mind for a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in relation to them." The direct evidence on this question is limited to that furnished by the three witnesses who were present when the proposed will was prepared and executed. Their evidence as to what occurred and as to what the deceased said and did is in accord up to the time of the signing of the instrument. It is clearly established that he freely communicated with Mr. Sutherland in the presence of Dr. Palmer and *Mr. Trieloff*, gave directions as to the disposition of his property, named the beneficiaries, designated the amounts he wished to bequeath to each, and described the specific property of each bequest. He informed them, in a clear and positive manner, of what property he had, its nature and whereabouts, and expressed approval separately of each bequest after it had been written and read to

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him. Upon these points, in the transaction of the making of this instrument, the evidence of these witnesses is in accord and as to what actually occurred and as to deceased's participation in them. There seems but one inference which can be drawn from all the facts and circumstances, namely, that up to the point of the signing and attestation of the instrument the deceased was possessed of sufficient mental capacity to make a will. The court, however, held that it was not shown that this state of his mind persisted to the conclusion of the transaction and that he consciously and understandingly participated in the final execution of the instrument.

We must turn to the evidence of these witnesses as the only direct testimony on this branch of the case. The witnesses Sutherland and *Trieloff* testify positively that the will was fully written and completed as directed by the deceased; that it was then read to him as a whole; that he understood it and declared that it expressed his will; that he signed it by making his mark in the manner described by them and Dr. Palmer; that he called Mr. Sutherland's attention to the fact that no one had been designated in it as executor, and that he thereafter indicated that he wished his business partner, *Trieloff,* named as executor, and that he pointed him out as present in the room; that *Trieloff's* name was then inserted and the will was signed by Dr. Palmer and Mr. Sutherland on a table placed near his bedside, and in the immediate presence of the deceased; that Mr. Sutherland then inquired of him whether he should deposit the instrument for safe-keeping with the county court or keep it in his safe, and that the deceased then directed him to keep it in his custody. Most of these material facts are not expressly denied by Dr. Palmer, but he states that after deceased had attached his signature he immediately reclined upon the bed, manifested no active participation in what transpired when he and Mr. Sutherland signed, that the deceased was then very weak and low,

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and that death followed in a very few moments. On direct examination he expressed it as his opinion that the deceased was of sound mind. Upon cross-examination he gave it as his opinion that during the time the transaction took place he had not sufficient mental capacity to make a will. In addition to the direct evidence of these three witnesses there is the opinion evidence of the physicians who testified as experts in support and denial of the fact of the deceased's testamentary capacity. An examination of the evidence given by Dr. Palmer shows that he took an active part, at the request of the deceased, in having the will made and drawn, assisted him in procuring an attorney, and discussed with him the nature of his property and the disposition he wished to make of it. He detailed facts and circumstances showing that the deceased gave him a comprehensive understanding of his purpose, that the deceased directed all the provisions of the proposed will, and that he declared it to be and signed it as his will, and that he (the doctor) signed his name as an attesting witness in the presence of the deceased and the other witness. He also stated to Mr. Sutherland at the commencement of the transaction that the deceased was of sound mind, and upon the trial he stated that he believed his mind was sound when this writing was drawn and signed, but that, in his opinion, the deceased had not sufficient mental capacity to make a will, and that he took no conscious active part in the attestation of the document. The facts and circumstances, as detailed by him, clearly contradict his opinion statements that deceased had not sufficient testamentary capacity and took no conscious part in the attestation. As indicated in *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220: "Certainly such testimony is thoroughly impeached by the witness himself." *Loughney v. Loughney,* 87 Wis. 92, 58 N. W. 250. All the other evidence, except that of the experts, points clearly and directly to the one conclusion that the deceased was possessed of testamentary capacity, and that he consciously participated in the

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completed execution of the instrument, and thereafter gave express direction for its safe-keeping and custody.

It is urged, however, that the fact of testamentary capacity is sufficiently rebutted by the opinions of the experts as to his mental incompetency, and by the facts and circumstances tending to show that the deceased was so weak from sickness that he was in a condition "almost reaching that of profound shock." We do not find these circumstances and the opinion testimony of sufficient weight to throw any uncertainty upon this fact. The opinions expressed by the experts were predicated on conditions, many of which we have shown did not exist, and they therefore are of slight weight in face of the actual facts upon which the contested issues must be determined. A consideration and study of the evidence leads us to the conclusion that this finding of the trial court is against the clear preponderance of the evidence.

The court also found that the circumstances surrounding the giving of the legacy to *Charles Trieloff* were "such as to call upon him for explanation and a showing that the same was a free, voluntary, and intelligent act of the said deceased, which has not been done." This determination of the court is preceded by a recital of facts, stating that the legatee, *Charles Trieloff,* and the deceased were and for a number of years prior to the making of the propounded will had been copartners in business, and as such a confidential relation had existed between them; that *Trieloff* visited the deceased frequently during his sickness, and did so four times on the day of his death; that he had in his possession the several certificates of deposit and the bank book of the deceased; and that nothing is shown suggesting any reason why deceased "should have given said legatee the legacy specified in said instrument." It is apparent that the trial court regarded these facts and circumstances as a *prima facie* showing that this legacy was procured by the undue influence of *Trieloff.* There is no other evidence on which such an inference can

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rest. If no such inference is justifiable, then *Trieloff* was not called upon to explain and show that this bequest was a free and voluntary one by the deceased.

"The field for the operation of undue influence or fraud being shown, together with satisfactory indications that the operation has taken place, then from that situation springs the presumption of fact that the person charged with the wrongdoing must meet and overcome by showing affirmatively that there was no wrong. A presumption against a person charged does not exist from the mere fact that there is such a charge, but because of facts and circumstances appearing which satisfactorily suggest wrong, and it is not till such facts and circumstances appear that it can properly be said the burden of proof to disprove wrong is on the person charged." *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407.

A consideration of all the evidentiary facts and circumstances material to this finding fails to show or suggest that *Trieloff* did, or attempted to do, anything to induce or persuade the deceased to make a will or to make him a beneficiary, should one be made. All the facts suggested by the court as the basis for such an inference cannot only readily and naturally be explained as in perfect harmony with *Trieloff's* exemption from wrongful conduct in the respect charged, but, when considered in the light of what actually took place, there is an entire absence of any wrongful purpose or the actual doing of any act indicating that he was attempting to influence the deceased in disposing of his property. Considerable stress is laid on the fact that *Trieloff* called on him four times on the day the instrument was drawn and that he held confidential interviews with him. True, he called; but it appears that he did so in response to requests from the deceased and from persons at the house, and there is nothing to show that the act of making a will was considered or spoken of by them, or that *Trieloff* had an opportunity before his last visit, when the will was about to be prepared, to communicate with the deceased concerning the making of a will. So

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far as shown, he first learned of this after the deceased had conferred with Dr. Palmer on the subject and had told him that he wished to leave some of his property to *Trieloff*. The conduct of the deceased when he made this instrument and directed its provisions in *Trieloff's* absence indicates that he was free from all restraint or compulsion and was acting freely, voluntarily, and deliberately.

It is contended that the provisions of the will for the widow and children indicate that he was unduly influenced to deprive them of what he would naturally have bestowed upon them had he acted freely and voluntarily. We are unable to find any sound basis for this contention. He seems to have made such provision for them as in his judgment seemed just and proper. This leaves the conclusion that a *prima facie* case of undue influence is shown against *Charles Trieloff* without support in the evidence, and the court erred in holding that he was called upon to meet and overcome such a showing.

By the Court.—The judgment is reversed, and the cause is remanded with directions that the court enter judgment admitting the instrument propounded as the will of Herman Muellenschlader to probate, and for further proceedings according to law.

STANDARD MANUFACTURING COMPANY, Appellant, vs. STALLMANN and another, Respondents.

April 18—May 8, 1906.

(1) *Appeal: Bill of exceptions: Questions reviewable.* (2) *Contract induced by fraud: Rescission.*

1. Where there is no certificate or statement of the trial judge to the effect that the bill of exceptions contains all the evidence, the supreme court on appeal can only consider whether the pleadings and findings sustain the judgment.

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2. Where one partner without having read a contract for the purchase of goods was induced to sign it in the firm name by false representations of the vendor's agent that the other partner had seen and approved the contract and left it for him to sign, and such false representations were such as, under the circumstances, reasonably excused the signing partner from reading the paper, the firm had the right, acting seasonably, to rescind the contract.

APPEAL from a judgment of the county court of Jefferson county: GEORGE GRIMM, Judge. *Affirmed.*

This action was brought by the plaintiff, a corporation, against the defendants, *Adolph Stallmann* and *Louis Stallmann,* copartners, to recover the price of goods alleged to have been sold under a contract made on or about the 15th day of June, 1902. The complaint alleges the performance of conditions on the part of the plaintiff and failure to perform on the part of the defendants, and asks damages on account of such breach. The answer, after admitting that defendants were copartners, denied generally the other allegations of the complaint, and alleged, in effect, by way of separate answer, that on the 17th day of June, 1902, an agent of the plaintiff came to defendants' store and had an interview with defendant *Louis Stallmann* in the absence of defendant *Adolph Stallmann,* in which said agent requested said defendant *Louis* to purchase the goods and sign defendants' firm name to the contract mentioned in the complaint; that said defendant *Louis* refused to purchase the goods or sign said contract; that subsequently on the same day said agent obtained an interview with defendant *Adolph Stallmann,* when defendant *Louis* was not present, and, with intent to defraud defendants, said agent falsely and fraudulently represented to defendant *Adolph* that defendant *Louis* had approved of the purchase of said goods, had examined and approved said contract and left the same for said *Adolph* to sign the firm name thereto; that said defendant *Adolph* believed said agent, and being in great haste and not having time to examine or read said contract, and relying upon the false representations of

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said agent of plaintiff, and believing the same, signed said firm name to said pretended contract without knowing the contents thereof, and that said pretended contract and the signature thereto were obtained from defendants by plaintiff and its agent by the fraud and false representations stated. The action was tried by the court and the following findings of fact and conclusions of law made:

Findings of fact: (1) That on the 17th day of June, 1902, the above-named defendant, *Adolph Stallmann,* signed the firm name of said defendants to the contract mentioned in and made a part of the plaintiff's complaint, without reading said contract and without knowing its contents or conditions, and in the absence and without the knowledge of said defendant *Louis Stallmann.* (2) That the signing of said contract by said defendant, *Adolph Stallmann,* was obtained and procured by means of false representations made to him by the plaintiff's agent; that at the time of said signing said agent falsely represented to said *Adolph Stallmann* that his brother and codefendant, *Louis Stallmann,* had seen and approved of said contract and left it for him, the said *Adolph Stallmann,* to sign, and that said *Adolph Stallmann* relied upon the truth of said false representations and believed the same, and was thereby induced to sign said contract, and that said false representations under the circumstances were reasonably calculated to, and did, excuse him from reading the contract. (3) That on or about the 3d day of July, 1902, the plaintiff shipped the articles mentioned in said contract to the defendants and sent them an invoice of the same. (4) That said defendants refused to accept said articles or any part thereof, and immediately and seasonably notified the plaintiff of said refusal and that they repudiated and rescinded said contract.

Conclusions of law: (1) That said contract is absolutely void and not binding on the defendants or either of them. (2) That said defendants are entitled to judgment revers-

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ing the judgment of the justice of the peace in said action, and that they have judgment against the plaintiff for their costs and disbursements in said action.

Judgment was rendered upon these findings of fact and conclusions of law, dismissing the complaint, with costs. Plaintiff excepted to the findings and appealed from the judgment.

W. H. Porter, for the appellant.

Harlow Pease, for the respondents.

KERWIN, J. The only questions involved upon this appeal are: (1) Whether the alleged contract upon which plaintiff seeks to recover is void because of fraud; and (2) whether the defendants seasonably repudiated and rescinded such contract after discovery of the fraud. There is no certificate or statement of the trial judge to the effect that the bill of exceptions contains all the evidence, therefore we can only consider whether the pleadings and findings support the judgment. *Daskam v. Beemer,* 64 Wis. 13, 24 N. W. 485; *Wille v. Bartz,* 88 Wis. 424, 60 N. W. 789; *Hussa v. Sikorski,* 101 Wis. 131, 76 N. W. 1117; *Watson v. Milwaukee,* 107 Wis. 328, 82 N. W. 692; *Optenberg v. Skelton,* 109 Wis. 241, 85 N. W. 356. It is contended upon the part of the appellant that the representations alleged to have been made are not such as should have misled the defendants, because courts cannot lend their aid to persons under circumstances which show that their own carelessness or inattention brings about the injurious results of which they complain. It is true, if the evidence were before us we might find facts and circumstances were proved upon the trial sufficient to show that no case was made entitling defendants to relief from the alleged contract under the doctrine laid down by this court. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Standard M. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923.

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But we think it equally clear that the proof under the allegations of the answer may have been such as to justify the court in finding that the defendants had been induced by fraud to sign the contract under such false and fraudulent representations as were reasonably calculated to excuse them from reading it or relieve them from the charge of negligence in signing it. *Standard M. Co. v. Slot, supra; Kaiser v. Nummerdor, supra.* In *Standard M. Co. v. Slot, supra,* this court said:

"It was entirely immaterial to plaintiff's cause of action whether its agent made false representations with specific bad intent or not. If false representations were in fact made, of such a character as to reasonably excuse respondent from reading the contract, and he was thereby induced to sign it without knowing its contents, it was competent for him to rescind the same if he acted seasonably."

The facts found by the court, heretofore stated, under the decisions of this court entitle the defendants to judgment, and, since these findings must be regarded as supported by the evidence upon this appeal, the judgment must be affirmed.

By the Court.—Judgment of the court below is affirmed.

STEARNS and another, Respondents, vs. JENNINGS, Appellant.

April 19—May 8, 1906.

Real-estate agents: Commissions: Contract as to order of sales.

Where the contract under which a real-estate agent was employed to find purchasers for lots expressly provided that they should be sold only in a certain order, he cannot, in an action on the contract, recover his commission for finding a purchaser for certain of the lots while others which were first to be sold remained unsold, even though the owner's refusal to sell to such purchaser was not based on that ground.

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APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

This action was commenced in justice's court, and from the judgment in favor of the plaintiffs therein the defendant appealed to the circuit court. The complaint as amended, so far as the question here involved is concerned, alleges, in effect, that in and by a contract in writing executed by the plaintiffs and the defendant December 18, 1903, the plaintiffs were to receive two per cent. of the sum of any sale for their services in finding a purchaser or purchasers for the real estate therein described or a part thereof; that July 29, 1904, the plaintiffs did find a purchaser for lots 6, 7, and 8, therein mentioned, for the price of $1,800, being $100 more than called for by the contract; that the purchaser so found was then ready, able, and willing to comply with the terms of said contract and pay the purchase price of said lots in cash on the delivery of the deed; that July 30, 1904, the defendant refused to make such deed or to fulfil her contract, and has ever since so refused; that by reason of the facts so alleged the defendant is justly indebted to the plaintiffs on account of said sale in the sum of $36, for which the plaintiffs demand judgment.

The defendant by way of answer alleges, in effect, that before the plaintiffs or either of them had found a purchaser for any of the lands described in the contract, the plaintiffs and the defendant mutually agreed that said contract be and the same was then and there terminated and each of the parties thereto mutually released from the obligations thereof; and, further answering, the defendant denies each and every allegation of the complaint not therein so specifically admitted or denied.

At the close of the trial it was stipulated in open court that a trial by jury be waived and the case be tried by the court, and that the court might find that said written contract had not been rescinded.

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Omitting what is irrelevant upon this appeal, the court, at the close of the trial, found as matters of fact in effect: (1) That since prior to December 18, 1903, the plaintiffs have been copartners and real-estate agents at Monroe. (2) That December 18, 1903, the plaintiffs were employed by the defendant to find for her a purchaser or purchasers for lots 1, 2, 3, 4, 5, 6, 7, and 8, in block 29, Tallman's addition to the city of Monroe; that such contract of employment was in writing and duly executed by both parties thereto. (3) That the prices, terms, and conditions of the sale of said lots were specified in said written contract as follows: "For lots 1, 2, and 3, taken as a whole, the sum of $1,600; for lots 2 and 3, the sum of $1,200; for lots 4 and 5, the sum of $5,000; for lots 6, 7, and 8, taken as a whole, the sum of $1,700; for the south half of 6, 7, and 8, the sum of $1,000; for the north half of 6, 7, and 8, the sum of $800; for an acre off the east side of outlot 36, the sum of $1,000; for the next acre adjoining, the sum of $1,000, *the lots to be sold only in the order they are enumerated above.*" (4) That it is also provided in and by said written contract that the defendant will execute to the purchaser found by the plaintiffs a warranty deed to said real estate, upon the purchaser complying with the said terms of sale, and that she will pay the plaintiffs, as their commission and compensation for finding "the purchaser for said real estate, or a part thereof, two per cent. of the sum of any sale." (5) That it is also provided in said written contract that the right of said agents to demand and receive said commission upon any sale or exchange of said real estate shall be denied in the "following instances, and no other," to wit: Should the defendant sell or exchange said real estate for the full value herein named without any assistance, directly or indirectly, from the plaintiffs, no commission or compensation whatever shall be charged or collected by them. That this contract may be canceled by the defendant at any time after three months from the date here-

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of, by giving to the plaintiffs thirty days' written notice of her desire to have the same canceled. (6) That the plaintiffs with reasonable diligence and on July 29, 1903, and while said contract was in full force, procured one L. H. Gapen to make a written offer of $1,800 for lots 6, 7, and 8, which was $100 more than the price for said lots specified in said contract; that said Gapen was ready, willing, and able to perform on his part; that the defendant refused to accept said offer, and rejected the same; that such refusal of such offer was not made because of the fact that lots 1, 2, 3, 4, and 5 had not been sold and were then unsold. (7) That the plaintiffs did not succeed in finding purchasers for any of said lots except for 6, 7, and 8 as aforesaid; that the defendant gave written notice to the plaintiffs July 30, 1904, of her desire to have said contract of agency canceled, and that the same expired according to its terms in pursuance to such notice August 31, 1904; that said contract had not been rescinded or canceled by mutual agreement of the parties prior thereto, but was in full force until August 31, 1904.

As conclusions of law the court found, in effect, that upon the delivery of the offer of said Gapen to the defendant and her rejection thereof the defendant became indebted to the plaintiffs in the sum of $36 as and for commission, and that they are entitled to judgment for said amount with costs to be taxed, and ordered judgment to be entered in accordance with such findings. From the judgment so entered the defendant appeals.

Colin W. Wright, for the appellant.

P. J. Clawson, for the respondents.

CASSODAY, C. J. The recovery by the plaintiffs against the defendant can be sustained, if at all, only on the ground that they were entitled by the terms of the contract to a commission of two per cent. of the sum of $1,800 offered by the purchaser found by them for lots 6, 7, and 8. This must be

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so, because the complaint is based upon the contract, and the cause of action therein alleged is for a commission which it is claimed the defendant agreed to pay by the express terms of the contract. There is no claim that at the time of finding the purchaser the contract had been changed or modified in any particular, and there is no attempt to reform the contract. On the contrary, it was stipulated by the parties that at that time the contract had not been rescinded. There is no pretense that the plaintiffs recovered by virtue of any agreement except the one embodied in the contract. The denial in the answer put in issue the right of the plaintiffs to recover under the contract. The decision of the case must turn upon the construction to be given to the written contract, the essential portions of which are embodied in the findings of the court above set forth and need not be here repeated.

To appreciate the significance of the contract it may be well to understand not only the language employed but also the situation of the premises. The eight lots mentioned in the findings, taken together and as a whole, were bounded on the north by George street, on the west by Adams street, on the south by Tallman street, and on the east by "outlot 36" mentioned in the second and seventh findings. Lots 1, 2, and 3, numbered from the east to the west, front to the north on George street. Lots 6, 7, and 8, numbered from the west to the east, front to the south on Tallman street. Lots 4 and 5 are between the two groups of lots mentioned, and both front to the west on Adams street. Lot 4 is bounded on the north by lots 1, 2, and 3, and on the south by lot 5; and lot 5 is bounded on the north by lot 4 and on the south by lots 6, 7, and 8. The defendant's house is situated on the line between lots 4 and 5, and fronts west on Adams street, and her barn is situated on lot 8. There was no authority in the contract for selling any of the eight lots mentioned, except in groups. The plaintiffs were thereby authorized to sell "lots 1, 2, and 3,

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taken as a whole," for the sum therein named, or lots 2 and 3 for the sum therein named, but there was no price named and no authority given to sell lot 1 alone. So the plaintiffs were thereby authorized to sell "lots 4 and 5" together, upon which the defendant resided, for the sum therein named. So they were thereby authorized to sell "lots 6, 7, and 8, taken as a whole," for the sum therein named; or the south half of those three lots, or the north half of those three lots, for the sums respectively therein mentioned. Following such authority in the contract is this significant stipulation therein: "The lots to be sold *only in the order* they are enumerated above." This language is plain, and effect must be given to it if possible. It is very evident from the language thus employed that the purpose was not to give authority to sell the homestead while lots 1, 2, and 3, taken as a whole, or at least 2 and 3, remained unsold. So the manifest purpose was not to allow the sale of 6, 7, and 8 as a whole, or the north or south half thereof, while the homestead remained unsold. True, the defendant agreed in and by the contract to pay to the plaintiffs, "as their commission and compensation for finding the purchaser for said real estate, *or a part thereof*, two per cent. of the sum of *any sale*." But this manifestly means "any sale" thus authorized by the contract, and not any sale made in violation of such express stipulation in the contract. We find no ambiguity, much less repugnancy, in the provisions of the contract thus referred to. The same is true in respect to the provision of the contract reserving to the defendant the right to "sell or exchange said real estate for the full value" therein "named, without any assistance, directly or indirectly, from" the plaintiffs, and without paying them any commission or compensation on account of such sale or exchange made by the defendant herself. The sale by the defendant of the "acre on the east side of outlot 36" was sanctioned by the trial court under the provision of the contract last referred to. True, the trial court found that the

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defendant's refusal to accept the written offer made by Gapen to purchase lots 6, 7, and 8, and pay therefor $1,800, was not made because of the fact that lots 1, 2, 3, 4, and 5 had not been sold and were then unsold. But such failure of the defendant to reject such offer on that ground did not give to the plaintiffs a right of action under the contract in violation of the express terms of the contract.

We must hold that by the express stipulation in the contract the plaintiffs had no authority to sell lots 6, 7, and 8 while lots 1, 2, 3, 4, and 5 remained unsold; and hence that the plaintiffs have failed to prove any cause of action against defendant.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

EICHMAN, Respondent, vs. BUCHHEIT, Appellant.

April 19—May 8, 1906.

Municipal corporations: Automobiles: Ordinance limiting speed: Reasonableness: "Crossings:" Injury resulting from ordinary noises of machine: Instructions to jury: Burden of proof: Preponderance of evidence: Proximate cause: Charge should be written out.

1. A municipal ordinance limiting the speed of automobiles within a radius of half a mile from a certain bridge is not invalid because it fails to provide for establishing or marking in any way the limits of such district so that a driver will know when he reaches it.
2. In an ordinance regulating the use of automobiles upon the streets of a city and limiting the speed to six miles per hour between crossings and four miles an hour at crossings, the word "crossings" plainly refers to street crossings.
3. The speed permitted by such ordinance is not unreasonably low.
4. A charge to the jury confusing burden of proof and preponderance of evidence, and stating that if, after considering all the testi-

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mony, the jury are *inclined to the opinion* that plaintiff is entitled to recover, then he has established his claim by a preponderance of the testimony, is *held* prejudicially erroneous.

5. A charge defining proximate cause as "the efficient cause from which the injury follows in unbroken sequence without any intervening cause to break the continuity," is erroneous.
6. Reduction of the charge to writing before giving it to the jury, in order to avoid the looseness of construction, repetition, and inaccuracy of statement inevitable in an oral charge, is strongly urged.
7. For an injury resulting from the ordinary noises or the appearance of an automobile, not caused by its excessive speed, there can be no recovery.

APPEAL from a judgment of the county court of Jefferson county: GEORGE GRIMM, Judge. *Reversed.*

This is an action to recover for personal injuries. The plaintiff's evidence tended to show that on September 30, 1904, at a little after 6 o'clock p. m., he was riding south on Third street in the city of Watertown in a milk wagon drawn by one horse driven by himself; that two other men sat on the same seat with him; and that as he arrived near the intersection of Milwaukee street an automobile, driven by the defendant, approached, going north at a speed of about ten miles an hour; and that the plaintiff's horse jumped to the right, and the plaintiff fell out of the wagon, striking on his shoulder and injuring him. An ordinance of the city of Watertown was offered in evidence which provides that no automobile should be driven faster than six miles an hour in the city of Watertown within a radius of half a mile of Main street bridge, and should slow down to four miles an hour at crossings. It was also proven that the place where the accident happened was within the prescribed half-mile limit. The defendant denied that he was driving the auto at the time in question, and denied that its speed at that time exceeded four miles an hour, and made the claim that the plaintiff was guilty of contributory negligence.

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The jury found a general verdict for the plaintiff, and assessed his damages at $321.50, and answered three special questions submitted to them by the court, as follows: *Q.* Was the defendant guilty of negligence which caused the injury? *A.* Yes. *Q.* What was the proximate cause of the injury? *A.* High speed and sudden approach of automobile. *Q.* Was the plaintiff guilty of negligence which contributed to the injury? *A.* No. A motion to set aside the verdict and for a new trial was overruled, and judgment on the verdict was rendered for the plaintiff, and the defendant appealed.

Harlow Pease and *Gustav Buchheit,* for the appellant.

R. B. Kirkland, for the respondent.

WINSLOW, J. The appellant attacks the validity of the ordinance limiting the speed of automobiles in the city of Watertown, on the ground that it is uncertain and unreasonable; uncertain, because no provision is made for establishing or marking in any way the limits of the district so that the driver will know when he reaches the half-mile radius, and because there is nothing to show whether the word "crossings" means highway crossings or railroad crossings; and unreasonable, because the limit of speed is an unreasonably low rate. In our judgment these objections are not well founded, and we shall devote little time to them. It has generally been deemed wise for cities to limit by ordinance the rate of speed by vehicles upon its streets, in the interest of public safety. We do not deem it necessary for the municipality to erect signs at the city limits or elsewhere to inform the traveler at what point the area of limited speed begins, nor do we think that the word "crossings" can be reasonably considered uncertain in its meaning. The ordinance is an ordinance to regulate the use of automobiles upon the "streets" of the city, and the word "crossings" plainly refers to street crossings, where the danger resulting from high speed

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is the greatest. We cannot say that a speed of six miles per hour between crossings and four miles an hour at crossings is unreasonably low.

There are, however, two very palpable errors in the instructions given to the jury which must result in reversal of this case. After charging the jury that the burden of proof was on the plaintiff to convince them by a preponderance of the testimony of the material facts necessary to establish his right of recovery, and that preponderance of the testimony means that testimony which weighs heaviest in their minds, the trial judge proceeded further to say:

"If, after a consideration of all the testimony, you are inclined to the opinion that under these instructions of the court the plaintiff is entitled to recover, then the testimony preponderates in his favor, and he has established his claim by a preponderance of the testimony."

It is very evident that by this sentence the whole matter of burden of proof and preponderance of evidence is plunged into inextricable confusion. The jury are here told in effect that preponderance of evidence and burden of proof mean the same thing; and not only this, but that if they are *inclined to the opinion* that the plaintiff is entitled to recover, then the plaintiff has not only produced the preponderance of evidence, but also has discharged his duty as to the burden of proof. The error is plain and must have been prejudicial. Preponderance of evidence and burden of proof are not the same thing, although they run into each other. By preponderance of evidence is meant the evidence which possesses greater weight or convincing power; by burden of proof is meant the duty resting on the party having the affirmative of the issue to satisfy or convince the minds of the jury, by the preponderance of the evidence, of the truth of his contention. It is not enough that his evidence is of slightly greater weight or convincing power; it must go further, and satisfy or convince the minds of the jury, before the burden of proof is

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discharged. *Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077, and cases cited.

The trial judge charged the jury as to proximate cause as follows:

"The proximate cause is the efficient cause from which the injury follows in unbroken sequence without any intervening cause to break the continuity."

The correct definition of proximate cause has been so frequently given by this court in recent years that an inaccurate definition now seems hardly excusable. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 286, 72 N. W. 735; *Feldschneider v. Chicago, M. & St. P. R. Co.* 122 Wis. 423, 99 N. W. 1034. The definition given by the trial judge was incorrect, and has been frequently condemned by this court.

The trial judge charged the jury in one part of his charge as follows: "The speed of the automobile alone cannot be made the foundation of an action for damages." A few sentences later he charged as follows: "If you should find that it was any other reason than his [defendant's] excessive speed which caused the horse to shy and the injury to happen, then the plaintiff cannot recover." What basis there was left upon which a verdict for the plaintiff could be given, after these two instructions had been given, it has been impossible for us to see. The jury had been told that there could be no recovery based on speed alone, and then were told that there could be no recovery for any other reason than speed. While this confusion of ideas was prejudicial to the plaintiff rather than to the defendant, it is deemed proper to notice it here because it emphasizes very sharply the danger of attempting to charge a jury orally. It was stated on the argument that the charge in this case was an oral charge, and its looseness and contradictory character bear very convincing evidence that such was the fact. The office of the charge is to state clearly and concisely to the jury the issues of fact, and the principles of law which are necessary to enable them to rightly

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solve those issues. The *desideratum* is that the issues be stated clearly, and the law applicable to each issue be stated logically and concisely, without unnecessary repetition and in such terms that a layman can understand it. Few men, however great their ability, possess minds so clear and comprehensive that they can orally enunciate the legal propositions applicable to an important case with the clearness and exactness which a charge should have. The writer of this opinion has had some experience in this field, and does not speak upon mere theory. There will infallibly be more or less of looseness of construction, of repetition, and inaccuracy of statement in an oral charge, all of which may be avoided by reducing the charge to writing. The litigant is frequently unable to take the case further than the trial court; for him it is the court of last resort; and hence he is entitled to ask in all confidence that the trial judge shall give the case his best thought and utmost effort to submit it to the jury in clear terms, and in accordance with the law as he finds it. In a case involving serious questions of law this can only be done by means of a carefully written charge, and we cannot urge this course upon trial courts too strongly.

It was argued in the present case that the evidence showed that the fright of the horse was caused by the noise of the automobile or the sound of the horn, and not by the excessive speed, if there was excessive speed, and that hence the speed could not be found to be the proximate cause of the injury. We do not find it necessary to pass upon this question now. Of course, the plaintiff must show, in order to recover, that the excessive speed was the proximate cause of his injury; *i. e.* that the fright of the horse was caused by the excessive speed as a natural and probable result, which result or some injurious result should have been anticipated by the defendant under the circumstances. If the horse was frightened by the ordinary noise made by the automobile which was not greater or different than the noise made when propelled at

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legal speed, or by the mere appearance of the automobile, there can be no recovery, for the reason that the excessive speed was not the proximate cause, and there can be no liability for injury resulting from the ordinary noises or the appearance of the machine not caused by its excessive speed. The making of such noises is not negligence. *Cahoon v. Chicago & N. W. R. Co.* 85 Wis. 570, 55 N. W. 900.

By the Court.—Judgment reversed, and action remanded for a new trial.

WOLBERT, Appellant, vs. BEARD and others, Respondents.

April 19—May 8, 1906.

Partition: Estate in possession: Wills: Construction: Power in trust: Equitable conversion: Appointment of trustee: Precatory words.

1. Land was devised to testator's widow for her life, and an annuity was also bequeathed to her. Subject to such provision all the testator's property was given to his daughter and a grandson, it being provided that in case the daughter died before her husband her share be paid to her children, and that claims against the grandson, part being in favor of the estate absolutely and part contingently, should be charged to and deducted from his share. The duty of making such payments, as to both shares, was imposed on the executor, and the will stated that it was the testator's desire that the probate judge, after the settlement of the executor's account, appoint him trustee to control and manage the estate, to collect rents, pay all debts, and deposit all proceeds in savings bank until all debts were paid and the widow paid, from the proceeds of said rents, when her annuity became due. The will further directed that the real estate be kept intact until claims were paid, and then, if the heirs should prefer to continue receiving the proceeds, they might do so by securing payment of the widow's annuity. *Held*, that it was the testator's intention that the executor as trustee should continue in control of the estate under a power in trust during the lifetime of the widow, with power to convert the whole into money; and during such time the grandson had no estate in possession which would entitle him to maintain an action for partition.

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2. The request that the probate judge appoint the executor as trustee was equivalent to an appointment by the will.
3. When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction.
4. In a will a trust may be created by intention of the testator discovered by aid of judicial construction, as well as by words taken in their literal sense.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Action for a partition of certain real estate held by title referable to the will of P. M. Pierce, deceased.

Mr. Pierce died testate. His will was duly admitted to probate, defendant *Edward F. Hansen* being appointed executor. In due course the administration of the estate, except settlement of the executor's account and the entry of a final order, was completed. The claim of the plaintiff is that he and the defendants *E. E. Beard, Roland D. Crocker, Estelle Crocker Reese, Rachael Beard,* and *Dorothea Beard,* devisees under the will of the entire title to the realty, subject to a life estate in the widow, *Elizabeth C. Pierce,* are entitled to possession thereof, and are in fact in such possession so far as they were entitled thereto by the will. The executor claims that after the full execution of the will, as regards administering the estate, he is required to control the property under a power in trust during the lifetime of the widow. The real estate in controversy includes what was the homestead of deceased, and was devised to the widow for her life or so long as she remained unmarried. There was also bequeathed to her an annuity of $600 per year, to be paid quarterly in advance for her life, or so long as she remained unmarried. All the property, subject to such provision for the widow, was devised and bequeathed to the plaintiff and the defendant *E. E. Beard,* the provision for the latter being, however, contingent upon her surviving her husband, R. O.

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Beard, and on condition that in case of her not so surviving it should go to her four children, the defendants *Roland D. Crocker, Estelle Crocker Reese, Rachael Beard,* and *Dorothea Beard.* The share of plaintiff was conditioned that a note for $719.90, given by him to the deceased, and the amount due on another note, given by the former and indorsed by the latter to the defendant bank, for $1,200, should be a charge thereon.

All the facts aforesaid and such others as were requisite to make a cause of action for a partition, if one was proper, in view of the state of the title under the will, were stated in the complaint. It was alleged that all persons interested in the realty in remainder were ready and willing to secure the annuitant such part of the income provided for her as was made chargeable upon their several shares. A copy of the will was made a part of the complaint. That portion thereof material to be examined in the disposition of the appeal is as follows:

"All the residue of my estate, both real and personal, of whatsoever it may consist, or wherever it may be found, I give and bequeath to my heirs, to wit, *Mrs. E. E. Beard,* my daughter, wife of R. O. Beard, now of Minneapolis, Minnesota, and my grandson, *Granville W. Wolbert,* now of St. Paul, Minnesota, share and share alike. In case of the death of my said daughter before her husband I order that her share of my estate be paid to her four children, to wit, *Roland B. Crocker,* of Newark, New Jersey, *Estelle Crocker Reese,* wife of Dr. Reese, of Minneapolis, Minnesota, *Rachael Beard,* her daughter, and *Dorothea,* also her daughter, both of Minneapolis, Minnesota, share and share alike.

"I order that one note for $719.50 Seven Hundred and nineteen and 50-100 dollars, made by my grandson, *Granville W. Wolbert,* to me, being part of estate, if not sooner paid, be charged to him and deducted from his share of my estate with the interest remaining unpaid.

"I also order that if my grandson *Granville W. Wolbert* shall owe any bank, or other person in Beloit, which has my name signed to the debt, it shall be charged to him and de-

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ducted from his share of my estate, as such signature of mine is but only a security for the payment of said indebtedness, the debt being made for his sole benefit, and therefore should be paid by him with interest.

"At the settlement of my executor's account in probate court I desire the said probate judge to appoint my said executor, *Edward F. Hansen,* trustee, to assume control of all my estate, both real and personal, to prosecute and execute the business of said estate, especially and generally for the best interests of said estate, to rent all tenements to good, honest, responsible tenants, who will pay rents in advance, and look after all temporal interests and all repairs, and do all necessary work to collect rents, pay all debts, and deposit all proceeds in savings bank until all my debts are paid; and my wife paid, from the proceeds of said rents, when her annuity becomes due.

"I order that my real estate be kept intact, that nothing be sold before all claims are liquidated, and then, if my heirs should prefer to continue receiving the proceeds, they will have the right so to do by securing wife her annuity promptly when due."

The executor demurred to the complaint for insufficiency, and the demurrer was sustained. The plaintiff appeals.

The cause was submitted for the appellant on the brief of *E. D. McGowan;* for the respondents *Beard, Crocker,* and *Reese* on the brief of *Ruger & Ruger,* attorneys, and *Henry J. Fletcher,* of counsel; and for the respondent *Hansen* as executor on that of *J. C. Rood.*

MARSHALL, J. It is conceded that if testator purposed that the control of his estate should remain with the executor, acting as trustee, after conclusion of the ordinary administration, plaintiff had no interest in the land sought to be partitioned, denominated in sec. 3101, Stats. 1898, an "estate in possession," and so is not entitled to maintain the action. The case, therefore, must turn on the construction given to the will.

The property, in express terms, was willed to appellant and

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his sister, subject to the homestead right of the widow. It is evident, however, it was intended that the right of possession should be separated from the legal title, since it was provided that the share willed to the daughter should be paid to her four children in case of her death during the lifetime of her husband, and that claims to a large amount against appellant, part being in favor of the estate absolutely and part contingently, should be paid out of his share. The duty of making such payments, as regards both shares, was imposed on the executor. It is difficult to see how that duty could well be performed unless he retained control of the property with authority to convert the same into money.

The words "pay to her four children share and share alike" as regards the share contingently willed to the daughter, and the words "charged to him and to be deducted from his share" as regards appellant's portion, pretty clearly show that the purpose of the testator was that his estate should be treated as personalty. It would hardly be possible to take an estate composed largely of realty, divide it into two shares, satisfy out of one share a large amount of claims necessarily payable only in money, and subdivide the other share into four parts and pay one of such parts to each of four persons, in any other way than by converting the whole into money. In such circumstances such an intention is to be presumed and the doctrine of equitable conversion applied. *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650. Obviously it would be impossible to execute that part of the will relative to making such four payments without controlling the daughter's share till after the death of her husband.

In harmony with the foregoing, the testator expressed a desire that his executor should not surrender control of the estate upon the settlement of his account covering the administration period, but that under an appointment by the county judge as trustee he should assume, after such term, full control of all the property and remain in such control so long as

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necessary to fully carry out all purposes expressed in the will. The idea that such a period would not terminate till the death of his widow is clearly manifested by the direction for control to last and the income as it accrued to be paid into the bank for disbursement so far as necessary, in payment of the widow's annuity of $600 per year, till such annuity should be fully paid.

Further, the words expressly directing the "real estate be kept intact" till all claims should be liquidated (meaning till the debts of the deceased proved against his estate should be paid), and if the heirs "should prefer to continue receiving the proceeds they will have the right to do so by securing" prompt payment of the annuity, by necessary implication mean that after payment of all claims against the estate the executor or trustee need not longer keep the real estate intact, but may convert the same into other property under the broad discretionary power given to manage the estate for the best interests of all in his judgment, subject to the opportunity afforded to the heirs as stated. The words "continue to receive the proceeds" by themselves would suggest a prior receipt thereof by the heirs, but that would contradict the express requirement for the executor or trustee to receive such proceeds and deposit the same in the bank during the annuity period. Such words must mean that if the heirs prefer receiving the proceeds of the property *in specie* to having the executor or trustee accumulate the same they may do so by securing payment of the annuity to the widow independently of such proceeds. The clause suggests opportunity for the heirs to receive the income of the property *in specie,* not to receive the corpus of the property either in the form in which it was left by the testator or any other.

So, on the whole, the will plainly contemplates vesting of the legal title to the property in appellant and his sister, with a power in trust in the executor as trustee giving him full control, including power to sell the property during the lifetime

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of the widow subject to her right and subject to the right of the heirs, themselves, to have the income of the property as it was left, upon condition of their giving security for payment of the annuity.

The fact that the testator did not, in terms, appoint the executor as trustee, but requested the county judge to do so, is of little importance. Manifestly the handling of the property as the testator desired it should be administered would be impossible without a trustee, therefore he must have intended the request for the appointment of the executor in that regard, at the termination of the administration period, as equivalent to an appointment by will. If any act on the part of the probate judge were necessary, it would be one which it would be his duty to perform the same as in case of the appointment of an executor in harmony with the testamentary suggestion. The request under the circumstances created what is called a precatory trust.

When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction. *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155; *Swarthout v. Swarthout,* 111 Wis. 102, 86 N. W. 558. In a will a trust may be created by intention of the testator discovered by aid of judicial construction, as well as by words taken in their literal sense. That follows necessarily from the primary rule for the treatment of wills, that the intention of the testator manifested by his testamentary words must control. That rules this case in favor of the respondent.

By the Court.—The judgment is affirmed.

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TOWN OF BELOIT, Appellant, vs. HEINEMAN, Respondent.

April 19—May 8, 1906.

Pleading: Matter in abatement: Waiver: Towns: Authority to sue: Power to make lease: Estoppel of lessee: Appeal: Reversal: Direction of judgment.

1. **In an action by a town to recover money alleged to be due it on contract, the objection that the electors did not in town meeting authorize the bringing of the action goes wholly in abatement, and, unless expressly pleaded, is waived.**
2. **One who, under a lease from a town, has used its property cannot question the power of the town to make such lease in order to repudiate his agreement to pay for what he has received thereunder.**
3. **In an action by a town for rent of a stone crusher and for the cost of repairs thereon which defendant had agreed to pay, the complaint alleged the cost of such repairs to be $253.10. The jury found that the cost of such repairs was $263.85. On reversal of a judgment erroneously rendered against the town, judgment is directed for the rent and for the cost of repairs as alleged, the evidence establishing the larger amount not having been so admitted without objection as to justify treating the complaint as amended in that particular.**

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

The complaint alleges leasing by plaintiff to defendant of a certain stone crusher on November 4, 1902, upon an agreement by the latter to pay for its use $4 per day and to keep same in good repair, and that defendant used said machine until a certain date in May, when, on examination, it was found to be in very serious disrepair, dangerous to its existence if used, and protest was made against its further use, whereupon defendant agreed that, if permitted to use it without interruption, he would put it in first-class condition. Claim is made for $140 of rental and $253.10 costs of necessary repair paid by the city. The answer admits that the machine belonged to the city, but alleges that it was hired from

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one Powers in November, 1902, who then was chairman of the town board, and that the hiring and use was completed and paid for, and that again in April, 1903, the defendant rented the machine from Powers at $4 per day, and denies any agreement to repair or that it got out of repair by reason of any misuse of the defendant, and denies the alleged later agreement to put the machine in good condition, and then sets up that the contract of leasing on the part of the town was *ultra vires* and void.

Upon the trial objection was made to any evidence under the complaint for the reason that no action of either the electors in town meeting or formal action by the town board had been taken to authorize the bringing of the suit. Evidence was taken, followed by a special verdict to the effect (1) that the machine belonged to the town; (2) that the November, 1902, agreement was performed and payment made; (3, 4) that another agreement was made in the spring of 1903 for $4 a day and the making of all repairs; (5) that the machine was then out of repair, especially in that the axle was defective and sprung; (6) which caused, in operation, other injuries to the crusher; (7) the cost of repairing which was $263.85; (8) that the crusher got out of repair in the spring of 1903 otherwise than by ordinary wear, by reason of carelessness and negligence of the defendant; (9) that the expense of repairing the damages caused by such carelessness and negligence was $263.85; (10) that defendant, in consideration of being allowed to complete the use he desired of the crusher, agreed that he would have the same repaired and placed in the best possible condition satisfactory to the plaintiff; and (11) the expense of so doing was $263.85. It was admitted that the crusher was used in the spring of 1903 for eighteen days. It appeared that all the town supervisors participated in bringing the suit, but there was no record of any formal meeting or vote to that effect. It was conceded that no authority had been given at any town meeting.

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After the entry of the verdict the plaintiff moved for judgment upon the verdict and undisputed evidence for the $263.85 and $72 of rent. Defendant moved that the verdict be set aside and the complaint dismissed, for the reason that the same failed to state a cause of action or facts sufficient to support a judgment, and failed to show that the action was directed by the electors of the town or that the town board took any official action with reference thereto, and, in fact, affirmatively showed the contrary, and because the verdict was contrary both to law and to the evidence. Defendant also moved for a new trial on various grounds. The court held that, by reason of the absence of any authority from the electors to institute the suit, the complaint and evidence were insufficient to give the court jurisdiction, and therefore set aside the verdict and entered judgment dismissing the complaint, without prejudice to plaintiff's right to bring another action, and without costs. From such judgment plaintiff appeals.

For the appellant there was a brief by *T. S. Nolan* and *John Cunningham,* and oral argument by *Mr. Cunningham.*

For the respondent there was a brief by *O. A. Oestreich* and *Edward H. Ryan,* and oral argument by *Mr. Oestreich.*

DODGE, J. The contention of respondent, made as demurrer *ore tenus,* which prevailed with the trial court, that this action must be dismissed because it did not affirmatively appear that the electors in town meeting had authorized the commencement of this action, came altogether too late. The cause of action presented was on contract to recover that which the defendant had promised to pay for the use of the town's property. It was entirely a common-law cause of action, upon which the town, under its general corporate powers to sue and be sued, could maintain action except for some statutory limitation. If it be true, as argued, that a vote of the electors was a necessary preliminary to the bringing of a suit, an ob-

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jection to the action on that ground went wholly in abatement. It did not deny the indebtedness of the defendant to the town nor existence of the cause of action, but raised an obstacle which, until removed, postponed the right to commence the suit. This is distinctively matter in abatement, and, unless expressly pleaded, is waived. *Milwaukee Co. v. Hackett,* 21 Wis. 613; *Johannes v. Youngs,* 48 Wis. 101, 4 N. W. 32; *Milwaukee v. Herman Zoehrlaut L. Co.* 114 Wis. 276, 90 N. W. 187; *Bunker v. Hudson,* 122 Wis. 43, 53, 99 N. W. 448. The further objection which was not passed on by the trial court, that there was neither allegation nor record proof of formal resolution by the town board to institute the action, is exactly of the same character and ruled by the same considerations.

Another contention, not reached by the trial court, is that a contract to lease to defendant the stone crusher was beyond the corporate power of the town, and that, even if within such power, it was not within the powers delegated by law to the town board or any member or members thereof. Whatever limitations may have existed on the power of the town or on the town board or its officers to confer upon an individual the right to use such machine, they are entirely immaterial to the defendant, who has actually enjoyed that privilege under an attempted contract. No limitation rested upon his ability or power to agree to pay for such use, and he, having received all the benefits of such a contract as if it were valid, cannot now question its validity in order to repudiate his agreement to pay a price for that which he has received. *Farmers' & M. Bank v. Detroit & M. R. Co.* 17 Wis. 372; *Bullen v. Milwaukee T. Co.* 109 Wis. 41, 44, 85 N. W. 115; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *Madison v. American S. E. Co.* 118 Wis. 480, 95 N. W. 1097.

These views, resulting, as they do, in a legal liability of the defendant to respond for the price he agreed to pay for the use of this machine which he has had, render immaterial nu-

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merous other questions argued by counsel, such, for example, as whether the town board can institute a suit of this character without the vote of the electors, whether their decision so to do must be matter of record and proved by the record, whether it is to be presumed in absence of evidence, and whether either the town or its officers can rent such a machine.

The remaining question is whether a new trial is necessary, or whether, upon the facts found by the jury, judgment should have been entered in favor of the plaintiff. The verdict finds that in April, 1903, defendant promised to pay $4 a day for the use of the machine. Indeed, the answer so admits. Defendant's foreman himself testified that he used it eighteen days, which, at $4 per day, amounted to $72. Hence the *per diem* rental to that amount was undisputed. As to the defendant's liability for repairs, we confess there is some confusion upon the face of the verdict, which finds, first, that damage costing $263.85 to repair was proximately caused by a defect in the crusher, for which it might be argued defendant was not responsible, and then finds that exactly the same amount was required to repair damages caused by defendant's carelessness and negligence while using the machine, thus at least suggesting a doubt whether the jury had not found that the same injury was proximately caused by the ancient defect in the machine and also was caused by carelessness or negligence of the defendant, upon which view respondent insists the verdict is inconsistent. Nevertheless, by the tenth question, the jury also found that a new agreement was made by the defendant that, in consideration of being permitted to complete his work with the crusher, he would pay all expenses of putting it in best possible condition and entirely satisfactory to the plaintiff. There was evidence to support this finding, to the effect that about May 1, 1903, such agreement was made. Upon this last contract defendant's liability for such necessary expenses was complete, irrespective of whether they had been rendered necessary by an original defect in the ma-

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chine or by his mismanagement of it. The amount of the repairs so rendered necessary is again found to be $263.85, and is supported by the evidence, but not by the allegations of the complaint, which assert only expense to the amount of $253.10. It cannot be said that the evidence establishing the larger amount was so admitted without objection as to justify us in treating the complaint as amended, and judgment upon the verdict must, therefore, be limited to the amount prayed in the complaint, together with interest from the date of the commencement of this suit.

By the Court.—Judgment is reversed, and cause remanded with directions to enter judgment in favor of the plaintiff for the sum of $325.10 and interest from date of commencing suit, and for costs.

HOPKINS, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

April 19—May 8, 1906.

Railroads: Negligence: Injury to passenger while alighting: Sudden jerking of train: Pleading: Variance: Amendment to conform to proof: Verdict for plaintiff contrary to his evidence.

1. In an action against a railway company for injuries sustained by a passenger the complaint alleged that after defendant's servants had announced the arrival of the train at her station, and after it had come to a standstill, plaintiff arose from her seat and proceeded forward for the purpose of alighting, but before she had had a reasonable time to get off the train it was negligently and violently started and jerked, whereby plaintiff was thrown to the floor and injured. *Held*, that this allegation was broad enough to cover negligent management of the train in suddenly and violently starting it up while plaintiff was in the course of alighting, whether such starting was immediately before or immediately after the train came to a stop; and defendant having fully litigated such issue, and the jury having found that though

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the train was not started and jerked after it came to a stop, yet defendant's negligence in bringing the train to a stop was the proximate cause of the injury, plaintiff was entitled to judgment on the verdict.

2. If an amendment of the complaint were necessary, in such case, to make it conform to the proof and finding, it should have been permitted, all material questions having been fully tried and defendant not having been misled by the allegation of the complaint.

3. The fact that a verdict is contrary to a part of the evidence of plaintiff and his witnesses does not preclude a recovery by him thereon if it is supported by the evidence in the case.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

Action to recover damages for injuries alleged to have been caused by defendant's negligence. It is alleged that on September 16, 1903, plaintiff, under contract by the purchase of a passenger's ticket over its road for the trip, was a passenger from Clinton Junction to Delavan, Wisconsin, on one of defendant's passenger trains on its railroad; that the passenger train on which she was being carried as such passenger reached Delavan, and

"when said train was approaching near to and within a short distance of said station, and being slowed up for the purpose of stopping at its depot at Delavan, said defendant, by its servants, agents, and employees then and there in charge and control of said train, publicly announced the arrival at said Delavan station, opened the doors of the car in which plaintiff was so riding and collected the parcels, packages, and baggage of the passengers whose destination was Delavan, and proceeded toward the platform with such parcels and baggage in order to assist said passengers in leaving said train, and so then and there invited and directed the passengers, and especially this plaintiff, to prepare and make ready to get off of said train at its said Delavan station. That thereupon, in response to said invitation so extended as aforesaid, and immediately after said train had come to a full stop at the depot platform at Delavan, and after several of the passengers had alighted therefrom, plaintiff, in the exercise of due diligence,

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care, and caution on her part, arose from her seat in said car and proceeded toward the forward or east end thereof for the purpose of alighting therefrom, but before this plaintiff had had a reasonable or sufficient time, in the exercise of ordinary care, to get off of said train and while she was proceeding to get off, using due care and caution, and just as she was about to step upon the forward or east platform of said car, said defendant, by its servants, agents, and employees so in charge of said train, suddenly, negligently, and carelessly, and without any warning or notice to this plaintiff, caused said train to be suddenly, rapidly, and violently started and jerked, whereby this plaintiff was thrown with great force and violence upon the floor of said car and sustained the injuries hereinafter alleged."

The complaint then describes the injuries and demands damages. The answer admits the formal allegations of the complaint; that plaintiff was a passenger on its train, as she claims; that she had prepared to alight from its car upon announcement by those in charge of the train that it was about to stop at Delavan station; that the train gradually slowed up to make such stop; that plaintiff had arisen from her seat and taken a position near the east door for alighting from the car when it stopped; and that she fell while still on the car and sustained injuries; but the answer denied knowledge as to the extent and the effect of the injuries or as to any expense incurred on account thereof. All allegations not admitted were denied by the defendant, specifically those charging it with negligence, that plaintiff was in the exercise of due care and caution at the time of the accident, that the injury was caused by its negligence, and the amount of damages claimed.

The case was tried before a jury. When the testimony of both parties had been received and closed, defendant claimed that the issues tried permitted of no recovery except upon the theory that plaintiff's injuries were caused through the negligent starting of the train after it had come to a full stop and before she had had sufficient time in the exercise of due care to alight. Plaintiff at this time asked leave to amend

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her complaint so as to charge that defendant was negligent in that it "either caused said train to be suddenly and violently started and jerked forward after the same had come to a full stop, or negligently and carelessly stopped said train so as to negligently and carelessly cause a sudden and violent jerk and motion of said train and said car, whereby the plaintiff was thrown with great force and violence upon the floor of said car and sustained the injuries hereinafter alleged." The court refused to permit this amendment and submitted the case to the jury for a special verdict. The verdict was so framed as to cover the two phases of the evidence under which plaintiff claimed the right to recover, and she offered the proposed amendment to conform the complaint to the proof. A verdict was returned by the jury as follows:

"(1) Did the train first come to a full stop just before the plaintiff left her seat? *A.* No. (2) Did the train first come to a full stop just after the plaintiff reached the door of the car? *A.* Yes. (3) Was the train suddenly started again just after it first came to a full stop and when plaintiff was at the car door and before she had sufficient time to alight from the car? *A.* No. (4) If you answer this question 'Yes,' then answer this question: Was the defendant guilty of negligence in so starting said train? (5) If you answer the fourth question 'Yes,' then answer this question: Was such negligence the proximate cause of the plaintiff's injury? (6) If you answer the third question 'No,' then answer this question: Was the train negligently stopped when it was first brought to a full stop? *A.* Yes. (7) If you answer the sixth question 'Yes,' then answer this question: Was such stoppage of the train just after the plaintiff reached the door the proximate cause of her injury? *A.* Yes. (8) Was the plaintiff guilty of any negligence contributing to her injury? *A.* No. (9) If the court shall finally determine that the plaintiff is entitled to recover, at what do you assess her damage? *A.* $3,000."

The evidence adduced by the plaintiff on the subject of defendant's negligence was substantially to the effect that as the train approached the depot platform plaintiff arose from her

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seat after the brakeman had called out the station, walked to the front door of the car, standing with her hands against the door jamb; that the train stopped and then immediately and suddenly started and jerked forward, causing her, without any fault or neglect on her part, to fall to the floor. The defendant produced a large number of witnesses from among the persons who were riding in the coach at the time of the accident, those who were at the depot when this train arrived, and trainmen, including the engineer, the fireman, and the station agent. On the direct examination of these witnesses they testified, substantially, that as the train approached the station it gradually slowed down until it made its stop for unloading and loading passengers, and that it did not stop and then suddenly start up and jerk the coaches forward before coming to a full stop at the station. On cross-examination a number of these witnesses stated that, while the train was slowing down and before coming to a full stop at the station, there was a sudden jerk or jolt of the train and that this jerk or jolt caused plaintiff to fall. It was to meet this difference in the statements of the plaintiff's and defendant's witnesses, as to when and how the jerking and jolting of the train occurred, that plaintiff offered to amend her complaint by specifying either event as supporting the charge of negligence.

On April 14, 1905, the court heard the following motions on a stipulation between the parties that they might be heard and determined at that time as of the term: (1) Plaintiff's motion in renewal of her application to amend the complaint to conform its allegations to the proof. (2) Plaintiff's motion for judgment upon the verdict. (3) Defendant's motion to amend the verdict by striking out the answers of the jury to questions 6 and 7 of the special verdict. (4) Defendant's motion for judgment in its favor upon the verdict as amended pursuant to its motion respecting questions 6 and 7. The court refused to entertain a motion by plaintiff for a new trial in the event that defendant's motion to

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strike out the answers to questions 6 and 7 was granted, or to allow plaintiff to file exception to the court's charge, holding that the stipulation to hear motions after the term did not cover a motion for a new trial, and that the proper foundation had not been laid to entitle plaintiff to file exceptions to the charge after the term had ended at which the action was tried. The court on June 3, 1905, denied plaintiff's motion to amend her complaint, her motion for judgment in her favor upon the special verdict as rendered by the jury, and for the damages found by them; and granted defendant's motion to amend the special verdict by striking out the answers to questions 6 and 7 and its motion for judgment in its favor upon the special verdict as so amended, and directed that judgment be awarded accordingly. Judgment was rendered and entered June 14, 1905, dismissing the action upon the merits and adjudging that defendant recover of the plaintiff the sum of $234.66, its costs and disbursements in the action. This is an appeal from such judgment.

For the appellant there was a brief by *Edward Morrisey,* attorney, and *Olin & Butler,* of counsel, and oral argument by *J. M. Olin.* To the point that there was no variance between the complaint and the proofs, or, if any, it was immaterial and plaintiff was entitled to amend as matter of right, they cited, besides cases cited in the opinion, *Ridenhour v. Kansas City C. R. Co.* 102 Mo. 270, 14 S. W. 760; *Hansberger v. Sedalia E. R., L. & P. Co.* 82 Mo. App. 566; *Texas & P. R. Co. v. Buckalew* (Tex.) 34 S. W. 165; *Foley v. Riverside S. & C. Co.* 85 Mich. 7, 48 N. W. 154; *Powell v. Hudson Valley R. Co.* 84 N. Y. Supp. 337, 339; *Bell v. Thomas,* 61 Wis. 267, 270; *Fox River Valley R. Co. v. Shoyer,* 7 Wis. 365; *Texas & P. R. Co. v. Cox,* 145 U. S. 593, 604; *Booth v. Langley Mfg. Co.* (S. C.) 29 S. E. 204, 205; *Smith v. Bogenschutz* (Ky.) 19 S. W. 667; *Gates v. Paul,* 117 Wis. 170; *Post v. Campbell,* 110 Wis. 378, 382.

For the respondent there was a brief by *Thomas S. Nolan*

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and *H. H. Field,* attorneys, and *Chas. E. Vroman,* of counsel, and oral argument by *Mr. Vroman.* To the point that if the plaintiff, in the absence of a general allegation of negligence, relies upon and alleges in his complaint specific acts of negligence, he is confined in his recovery to the proof of such specific acts, they cited *Georgia B. Co. v. Henderson* (Ga.) 43 S. E. 698; *Louisville & N. R. Co. v. Wade,* 46 Fla. 197, 35 South. 863; *Chicago & A. R. Co. v. Vipond,* 101 Ill. App. 607; *Pennington v. Detroit, G. H. & M. R. Co.* 90 Mich. 505; *Albin v. Seattle E. Co.* 40 Wash. 51, 82 Pac. 145; *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636; *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326; *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65.

SIEBECKER, J. The negligence alleged by plaintiff, and upon which she relies to hold defendant liable, is that, after defendant's servants had announced the arrival of its train at Delavan and after it had come to a standstill, she "arose from her seat in said car and proceeded toward the forward . . . end thereof for the purpose of alighting therefrom, but before [she] had had a reasonable or sufficient time, in the exercise of ordinary care, to get off of said train and while she was proceeding to get off, using due care and caution, . . . said defendant, by its servants, agents, and employees so in charge of said train, suddenly, negligently, and carelessly, and without any warning or notice to this plaintiff, caused said train to be suddenly, rapidly, and violently started and jerked, whereby this plaintiff was thrown with great force and violence upon the floor of said car and sustained the injuries" as alleged. As above stated the evidence of the witnesses produced by the plaintiff is to the effect that, while plaintiff was standing near the car door ready to alight, the train stopped, and before she had left the car it suddenly and violently started forward with a jerk, causing her to fall to the floor. The witnesses produced by the defendant, some

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twenty-odd in number, all agreed on direct examination in their accounts of the occurrences at the time of the accident. They all stated that the train did not stop and then suddenly and violently start forward with a jerk. A number of them testified that the train gradually slowed down its speed and came to a standstill at the depot platform in the usual manner and without any sudden jerk or jolt. On the other hand, a number of these witnesses, on cross-examination on this subject, stated that, after the train had slowed down its speed and before it stopped and while the plaintiff stood near the car door ready to alight, it suddenly started up and jerked forward, causing her to fall to the floor. The jury found by special verdict that the train was not brought to a full stop and then suddenly started up again, as stated by plaintiff's witnesses, and thereby causing her to fall, but that the train was negligently brought to a full stop and that such negligence was the proximate cause of the injury. From the evidence and the instructions of the court upon the issues submitted it is obvious that the jury negatived the fact that defendant negligently started up the train after it had come to a standstill, but found that the train, while slowly moving and just before stopping at the station, was suddenly started up and jerked forward.

The question arises: Is the plaintiff, under the complaint, entitled to judgment upon the verdict? It is clear from the allegations of negligence that liability is predicated upon the negligent management of the train in suddenly and violently starting it up while plaintiff was in the course of alighting from it. The specific allegation of fact that the train had come to a standstill before she arose from her seat is not an indispensable element to the alleged cause of action, which charges defendant with negligence in suddenly, rapidly, and violently starting and jerking the train. So far as defendant's negligence is involved under the allegation of the complaint it is immaterial whether this negligent management

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of the train occurred immediately before or immediately after the train came to a stop. The cause of action alleged pertains to the negligent management of the train in the respect charged, when the plaintiff had reason to believe that she could safely proceed to alight from it. The situation presented is not within the rule which denies a recovery where the party declares upon one cause of action and then seeks to recover upon a different one under the evidence, nor is it the case of a failure of proof in support of the one alleged.

It is contended that the defendant had a right to assume that plaintiff relied upon this specific allegation of fact and, therefore, its testimony was restricted to showing that the train did not come to a stop and then suddenly start forward as claimed. The cause of action alleged is broad enough to include negligence by a sudden starting up and jerking of the train either immediately before or after stopping, and the complaint gave defendant information of the scope of this claim of negligence, and, as shown above, included the negligence found by the jury. An examination of the record also discloses that defendant produced a very large number of witnesses who testified in full as to the slacking of the speed of the train as it approached the depot, with detailed particularity as to any sudden, rapid, and violent starting and jerking of the train in making the stop for this station, and the management of the train in bringing it to a full stop for passengers to alight. It is difficult to perceive how the proof could have been fuller in all its details and broader in scope to meet the allegation of negligence in the complaint as we view it. We find no justification for the claim that defendant did not fully litigate the issue thus made by the pleading. To permit plaintiff to recover upon the case found by the jury is not in contradiction of the alleged cause of action as established under all the evidence. True, the finding is contrary to a part of the evidence of plaintiff and of the witnesses called by her, yet this does not preclude a recovery if the verdict is

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supported by evidence in the case. As stated in *Hill v. West End St. R. Co.* 158 Mass. 458, 33 N. E. 582, in a case where the circumstances under consideration were very similar to the situation before us:

"The law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be the source."

Applying a rule of liberal construction to this pleading, with a view to substantial justice between the parties, we find no justification for the claim that there is a variance between the alleged cause of action and the proof. The following cases are in point: *Hill v. West End St. R. Co., supra; Scarry v. Metropolitan St. R. Co.* 81 N. Y. Supp. 284; *Strahlendorf v. Rosenthal,* 30 Wis. 674; *Matthews v. Baraboo,* 39 Wis. 674; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50; *Cincinnati, H. & I. R. Co. v. Revalee,* 17 Ind. App. 657, 46 N. E. 352; *Hicks v. Galveston, H. & S. A. R. Co.* 96 Tex. 355, 72 S. W. 835.

The determination of this question renders consideration of the other questions argued and submitted unnecessary. It may, however, be observed that, if it were necessary to amend the complaint to conform to the proof, it should have been permitted as requested, for it is very clear that, since all material questions were fully tried by the parties, defendant was not misled by the allegation of the complaint. *Cody v. Bemis,* 40 Wis. 666; *Aschermann v. Philip Best B. Co.* 45 Wis. 262; *Russell v. Loomis,* 43 Wis. 545; *McKinney v. Jones,* 55 Wis. 39, 11 N. W. 606, 12 N. W. 381; *Rosenberg v. Third Ave. R. Co.* 61 N. Y. Supp. 1052; *Foley v. Riverside S. & C. Co.* 85 Mich. 7, 48 N. W. 154.

From these considerations it follows that defendant's motion to strike out the answers to questions 6 and 7 of the special verdict should have been denied, and that plaintiff's mo-

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tion for judgment upon the verdict as rendered by the jury should have been granted.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for plaintiff in accordance with this opinion upon the special verdict as rendered by the jury, and for further proceedings according to law.

CHAPMAN, Appellant, vs. CHAPMAN and others, Respondents.

April 19—May 8, 1906.

Wills: Election by widow: Right to share in residue.

Under secs. 2171, 2172, and subd. 6, sec. 3935, Stats. 1898, unless a widow renounces the provision made for her in her husband's will she is not entitled to share in any residue of his estate not disposed of by the will. *Hardy v. Scales*, 54 Wis. 452, followed.

APPEAL from a judgment of the circuit court for Jefferson county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an appeal from part of a judgment of the circuit court for Jefferson county affirming a judgment of the county court, by which a residue of personal property left undisposed of by the will of one Samuel Chapman was distributed to the respondents, sons and grandsons of deceased. The facts in the case are undisputed and are as follows: Samuel Chapman died testate April 14, 1904, leaving him surviving his widow, the appellant, two sons, and two minor sons of a deceased son, respondents. His will was duly admitted to probate and made provision for the widow and contained certain bequests unnecessary to state here. After payment of the legacies and costs of administration a residue of personal property remained which was undisposed of by the will. The widow made no election and failed to renounce the provision

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made for her in the will. Upon final settlement of the estate it was adjudged by the county court that, having failed to renounce the provision made for her in the will, she was not entitled to any share of the personal property undisposed of. On appeal the circuit court affirmed this judgment. The claim of appellant is that the widow should have shared equally with the children of her deceased husband in the residue undisposed of by the will, and this is the only question involved upon this appeal.

Frank H. Rogers, for the appellant.

For the respondents *Marvin C. Chapman* and *Theo. J. Chapman* there was a brief by *Tullar & Lockney* and *Charles E. Williams,* and oral argument by *D. S. Tullar* and *Henry Lockney.*

A. M. Webb, guardian *ad litem,* for the respondents *Walter Marcena Chapman* and *Mark Edwin Chapman.*

KERWIN, J. The question raised upon this appeal is one of law, namely, whether the widow is entitled to a portion of the personal property undisposed of, she having failed to renounce the provision made for her in the will. We think the case is ruled by the decision in *Hardy v. Scales,* 54 Wis. 452, 11 N. W. 590. It is claimed by appellant that statutory enactment subsequent to 1877 has changed this rule. The will in *Hardy v. Scales* took effect in 1877, although the case was not decided in this court until 1882, and after the revision of 1878, which contains the same provisions so far as material respecting the widow's election and distribution of personal property as the statutes which control the case here. We do not deem it necessary to consider statutes prior to 1877 upon the subject. Under the provisions of ch. 106, Laws of 1877, the widow was put to her election not only between the provisions in the will and her dower interest, but also as to her homestead rights and share in her husband's personal estate, and this statute has since remained substan-

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tially the same. It appears in the revision of 1878, and is now secs. 2171, 2172, Stats. 1898, and provides, in effect, that when provision is made for a woman in the will of her husband she shall make her election whether she will take under the will or under the law, but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator, and when she is entitled to an election she shall be deemed to have elected to take under the will, unless within one year after the death of her husband she file in the court having jurisdiction of the settlement of his estate notice in writing that she elects to take the provision made for her by law instead of the provision made by will, and upon filing such notice she shall be entitled to the same dower in his lands and the same rights to the homestead and the same share of his personal estate as if he had died intestate; and further provides that, when he dies testate, the share of his personal estate which she may take shall not exceed one third of his net personal estate, and that the provision of this and the two preceding sections shall not apply to any case where the husband shall die intestate leaving no issue. Sec. 1, ch. 99, R. S. 1858, respecting distribution, in force at the time the will in *Hardy v. Scales* took effect, after providing that the widow shall be allowed certain articles and also making an allowance out of the personal estate for the widow and children pending the settlement of the estate, further provided, subd. 6:

"The residue, if any, of the personal estate, shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of the real estate; except that the widow, if any, shall be entitled to receive the same share of such residue as a child of such intestate would be entitled to."

Under the revision of 1878 [sec. 3935], subd. 6 was amended so as to read as follows:

"The residue, if any, of the personal estate of any intestate,

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and the residue of the personal estate of a testator, not disposed of by his will and not required for the purposes hereinbefore mentioned in this section, shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of real estate in ch. 102, except that when the deceased shall leave a widow and lawful issue, the widow shall be entitled to receive the same share of such residue as a child of such deceased."

This amendment, it is claimed, so changed the statute as to take the present case out of the rule of *Hardy v. Scales.* Subd. 6, first above quoted, provides that the "residue," if any, of the personal estate shall be distributed, while the statutes of 1878 provide that the "residue," if any, of the personal estate of any intestate, and the residue of the personal estate of a testator not disposed of by his will, and not required for the purposes thereinbefore mentioned in this section, shall be distributed. It will be seen that the term "residue" in subd. 6 of the statute of 1858 was held in *Hardy v. Scales* broad enough to include all residue remaining undisposed of by will, and it has not been narrowed by the amendment. It will be seen that the amendment was intended to cover property not disposed of by will, and not required for the purposes mentioned in preceding subdivisions of the statute, the object manifestly being to make the statute more clear and explicit. So the amendment in the statute of 1878 does not materially change the law of 1858 respecting the distribution of the residue. It more specifically provides that the residue of the personal estate of an intestate, and the residue of the estate of a testator, not disposed of by will, and not required for other purposes specified in the chapter, shall be distributed as prescribed for the descent of real estate. The same provision was substantially continued in the Statutes of 1898.

So far as the question involved here is concerned, the change in the statute does not seem to materially affect it. In *Baker*

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v. Baker, 57 Wis. 382, 15 N. W. 425, the statute of 1878 appears in the opinion to be treated substantially of the same effect as the statute of 1858, and, while the party's rights became vested in that case under the law as it stood in 1858, the court appears to have recognized the statute of 1878 as being in effect the same as the statute of 1858. It would also appear from this decision that the amendment of subd. 6, referred to, in the revision of 1878, was made for the purpose of meeting the objection that no allowance could be made to a widow in any case when the deceased died testate and by his will had disposed of all his property, both real and personal, unless the widow renounced all rights under the will. The revisers' notes convey this idea. It seems the object of the amendment was to make subd. 6 of sec. 3935, R. S. 1878, clear that distribution should be made after payment of the allowance provided for in the preceding subdivisions, leaving the provision for distribution under subd. 6 to apply to the estate remaining after such allowance. *Baker v. Baker, supra;* Revisers' Bill of 1897, p. 1051. It will also be noted that *Hardy v. Scales* was decided in 1882, after the revision of 1878, and no reference is made therein to any material difference between the distribution statutes of 1858 and 1878 upon the question here, although the question discussed in *Baker v. Baker* respecting the widow's allowance is referred to. The *Hardy Case* involved the exact question here, since which decision there has been no change in the statutes, and we find nowhere in the language of the statutes themselves, in the notes of the revisers, or in the decisions of this court any intimation of legislative or judicial intent to depart from that rule. The *Hardy Case* has been approved and reaffirmed by this court and judicially recognized as the established law of this state upon the question involved. *Van Steenwyck v. Washburn,* 59 Wis. 483, 17 N. W. 289; *Graves v. Mitchell,* 90 Wis. 306, 63 N. W. 271; *Melms v. Pabst B. Co.* 93 Wis. 140, 66 N. W. 244; *Willey v. Lewis,* 113 Wis. 618, 88 N. W.

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1021. Under such circumstances and in view of the history of this statute, as well as judicial recognition and approval of the rule laid down in *Hardy v. Scales,* we cannot recognize mere change in phraseology not clearly indicative of intent to change the meaning of the former statute as persuasive. We cannot read out of the change referred to in the revision of 1878 any legislative intent to change the rule laid down in *Hardy v. Scales.* Under the doctrine established in that case and the statutes of this state as they have since existed, the election statute, secs. 2171, 2172, must be strictly if not literally followed respecting the provision made for the widow, and where she fails to renounce the provision made by the will she is barred from taking any other portion of her husband's estate, although such estate may not be fully disposed of by will. The revision of 1878, so far as this question is concerned, appears to be in perfect harmony with the decision of the *Hardy Case,* and is so recognized by the revisers in their notes, as well as by this court in subsequent decisions. In *In re Donges's Estate,* 103 Wis. 497, 510, 79 N. W. 786, the court says:

"The same word used in sec. 2171, R. S. 1878, which puts a widow to her election in case any provision is made for her, has been construed more than once, . . . the general result of which is to give the word an exact literal meaning, and to hold that the giving to the widow anything in form is a 'provision' within that statute, whether it be hers in possession, or whether it be valuable."

And in *Melms v. Pabst B. Co., supra,* the court says:

"It is argued that in some way Mrs. Melms's election to take under the law and not under the will did not affect the devise of the homestead, but that she retained title to the homestead under the will, while taking dower and personal property under the law; thus taking partly under the will and partly under the law. Secs. 2171, 2172, R. S. 1878, seem very clear on this subject. Sec. 2171 provides that when lands are devised to a woman, or other provision made for

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her in the will of her husband, she shall elect whether she will take under the will or under the law (not whether she will take partly under the will and partly under the law), but that she shall not have both unless such plainly appears by the will to have been the intent of the testator."

We feel constrained to hold that the case at bar is ruled by *Hardy v. Scales,* and therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

WELCH, Appellant, vs. KUKUK, imp., Respondent.

April 20—May 8, 1906.

Bills and notes: Extension of time for payment: Consideration: Payment of interest before due.

Payment of the interest before due is a sufficient consideration for an agreement to extend the time for payment of a note; but voluntary consent of the holder to an extension, given at the time of such prepayment of interest but not based upon it as a consideration, does not constitute a binding agreement to extend.

APPEAL from a judgment of the county court of Dodge county: J. A. BARNEY, Judge. *Reversed.*

This is an action to recover $200 and interest from June 28, 1903, alleged to be due from the defendants to the plaintiff upon a promissory note executed by the defendants June 28, 1902, wherein and whereby they, for value received, promised to pay to the plaintiff or bearer, one year after date, $200 with interest, no part of which note has been paid except the interest to June 28, 1903. The defendant *Kukuk* answered and admitted the making of the note and its contents as alleged in the complaint, and that nothing was paid thereon except the interest to June 28, 1903, and alleged as a defense, in effect, that he signed the note without considera-

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tion and for the accommodation of Marcus Sterr, all of which the plaintiff then and there well knew; that before the maturity of the note the plaintiff, for a valuable consideration and without his knowledge or consent, made a valid and binding agreement with Sterr extending the time for the payment of said note for one year from the date of its maturity and to June 28, 1904, whereby he was released from liability.

A jury having been waived, the court at the close of the trial found as matters of fact, in effect, that the note was executed at the time and for the amount stated in the complaint and was owned by the plaintiff, and that nothing had been paid thereon except the interest to June 28, 1903, and the balance of said findings of fact are as follows:

"That while said defendant, *Fred Kukuk,* in form signed said note as one of the makers thereof, he signed the same, as a matter of fact, without any consideration whatever and for the accommodation of and as surety for said defendant, Marcus Sterr, all of which said plaintiff then and there well knew. That before the time of the maturity of said note and on the 20th day of June, 1903, said plaintiff, for a valuable consideration and without the knowledge or assent of said defendant, *Fred Kukuk,* made a valid and binding agreement with said defendant, Marcus Sterr, whereby they agreed to and did extend the time for the payment of said note for one year from the date it by its terms matured and to the 28th day of June, 1904."

As conclusions of law the court found, in effect, that the defendant *Kukuk* is entitled to have judgment dismissing the complaint herein and for his costs and disbursements in this action, and ordered judgment to be entered accordingly. From the judgment so entered the plaintiff appeals.

For the appellant there was a brief by *Beach & Tillotson,* and oral argument by *R. D. Tillotson.* They argued, among other things, that the mere fact that the interest was paid at the time that the promise was made to extend the time of the note is not sufficient to constitute it the consideration for the

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promise. It must be shown that such payment in advance was actually the consideration for the promise of the creditor to extend the time. *English v. Landon,* 181 Ill. 614, 54 N. E. 911; *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056.

For the respondent the cause was submitted on the brief of *C. E. Hooker.*

CASSODAY, C. J. The note with interest was payable one year from the date thereof. Eight days before its maturity the defendant Sterr paid to the plaintiff the one year's interest thereon. It is conceded that the defendant *Kukuk* signed the note without consideration and for the accommodation of the defendant Sterr. It is claimed on the part of *Kukuk* that eight days before the maturity of the note, and without his knowledge or assent, the plaintiff and Sterr made a valid and binding agreement to extend the time for the payment of the note for one year, or to June 28, 1904, and that he was thereby released from liability on the note. It is conceded that the only consideration for such agreement was the payment of such interest eight days before it became due. It is well settled that the prepayment of interest before maturity may be a good consideration for a promise to extend the time of payment. *Ready v. Sommer,* 37 Wis. 265, 267, 268. In that case there was a mutual agreement in writing, and Chief Justice RYAN said:

"The prepayment is a sufficient consideration for the extension, under all the authorities, and we think that we ought to hold that the payment sufficiently appears in the paper as a consideration to support the agreement to extend. The payment and the extension are parts of one transaction, evidenced by one paper; the payment benefiting the one party, and the extension the other." See *Union Nat. Bank v. Cross,* 100 Wis. 174, 177, 75 N. W. 992.

It is equally well settled that "there must be an agreement to forbear, either express or implied, and mere forbearance

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voluntarily granted by the claimant will not avail." 6 Am. & Eng. Ency. of Law (2d ed.) 743; *First Nat. Bank v. Cecil,* 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393; *Mecorney v. Stanley,* 8 Cush. 85. Thus it is held that:

"Mere forbearance to sue, without any agreement to that effect, is not a sufficient consideration for the promise of another to pay the debt of the person liable, although the act of forbearance was induced by such promise." *Manter v. Churchill,* 127 Mass. 31.

The question recurs whether the trial court was justified in finding that the plaintiff and Sterr made a valid and binding agreement to extend the time of payment for another year. Did the plaintiff agree to such extension in consideration of the interest being paid before maturity, and did Sterr pay the interest before maturity in consideration of an agreement on the part of the plaintiff to so extend the time of payment? Or did Sterr voluntarily make the payment at the time he did? And did the plaintiff voluntarily consent to such extension without regard to whether the interest was paid before maturity or not? The plaintiff and Sterr were alone at the time it is claimed the alleged agreement was made. Sterr testified to the effect that the plaintiff came to see him June 20, 1903; that he paid him the interest on the note on that day; that he made an arrangement about extending the time of payment of the note on that day; that the arrangement was that he said to the plaintiff that note must be due; that the plaintiff then said it was over a week yet; that he then said to the plaintiff, "How is it—do you want the money now, or will you leave it stand?" That the plaintiff then said, "You can keep it for another year or as long as I live;" and that Sterr then "paid him the interest and nothing further was said after that." There is also testimony tending to prove that the plaintiff subsequently admitted that the time of payment of the note had been extended for a year. For the purpose of this appeal we must assume that such testimony is true, notwithstanding the testimony of

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the plaintiff to the effect that, at the time of the payment of such interest, there was no conversation about extending the time of payment of the note. It will be observed that there is nothing in the testimony of Mr. Sterr authorizing a finding that he paid the interest before maturity as a consideration for such extension, or that the plaintiff agreed to such extension in consideration of such payment of interest being made before maturity. In other words, it appears from such testimony that Sterr voluntarily paid the interest before maturity, and that the plaintiff voluntarily consented to such extension without regard to the time when such interest was paid. This makes it unnecessary to consider whether such testimony justified the finding that there was a valid agreement to extend the time of payment for a fixed and definite time. We must hold that the defendant *Kukuk* was not released from liability by reason of such extension.

By the Court.—The judgment of the county court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff and against the defendant as indicated in this opinion.

BARCHENT, Respondent, vs. SNYDER, Appellant.

April 20—May 8, 1906.

Mortgages: Deed absolute in form: Wrongful conveyance to third person: Equity: Adequate remedy at law.

1. The fact that a deed absolute in form is in legal effect a mortgage may be shown in an action at law.
2. Where the grantee in a deed absolute in form but in legal effect a mortgage wrongfully conveyed the land to a third person for a sum greater than the mortgage debt, the mortgagor, acquiescing in such sale, may recover the excess from the mortgagee in an action for money had and received. No accounting is necessary and, the remedy at law being adequate and complete, an equitable action will not lie.

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APPEAL from an order of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *J. C. Russell* and *John Barney,* and oral argument by *Mr. Russell.*

For the respondent there was a brief by *Butterfield & Rix,* and oral argument by *P. A. Rix.*

WINSLOW, J. This is an action in equity. The complaint alleges, in substance, that the plaintiff owned and possessed certain described lands in Minnesota, and on October 3, 1900, deeded the same to the defendant as security only for a loan of $2,500 then made to him by the defendant, taking back a land contract for the reconveyance of the lands upon payment of said $2,500 with interest; that in February, 1902, the defendant demanded and received from plaintiff possession of said lands on the claim that he (the defendant) had title thereto and right of possession, and wrongfully deeded the same to one Selleck for $3,800, in which sale, though unauthorized, the plaintiff now acquiesces; that the plaintiff has demanded payment of said sum of $3,800, less said loan of $2,500 and interest, but defendant refused to pay the same. Judgment is demanded that the deed and contract be adjudged to constitute a mortgage, that defendant account for the amount received by him on said sale with interest, less said loan and interest, and that plaintiff have judgment for the balance with costs, and for such further relief as may be just. A general demurrer to the complaint was overruled, and the defendant appealed.

It is clear that the plaintiff planted his cause of action on the equity side of the court, and it is equally clear that he needed no equitable relief. It is not necessary to reform the deed. The fact that it is in legal effect a mortgage may be shown in an action at law as well as in an action in equity. *Kent v. Agard,* 24 Wis. 378; *Jordan v. Estate of Warner,* 107 Wis. 539, 83 N. W. 946. No accounting is necessary, as

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the amount claimed is but a single definite sum and does not involve the examination of any account. So there is no feature of the case calling for the exercise of the peculiar powers of a court of equity. The only relief necessary is a judgment for a certain definite sum of money held by the defendant which of right is alleged to belong to the plaintiff. This relief can be fully obtained in an action at law as for money had and received.

It is suggested that the defendant holds the money as constructive trustee, and that equity always will take cognizance of actions involving trusts, even though there may be a remedy at law. Mr. Pomeroy says in relation to this subject (1 Pom. Eq. Jur. [3d ed.] § 178):

"Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting, and the like, still if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties—in the particular case, the concurrent jurisdiction of equity does not extend to such a case."

So it is said by the supreme court of the United States:

"Whenever one person has in his hands money equitably belonging to another, that other person may recover it by *assumpsit* for money had and received. . . . The remedy at law is adequate and complete."

It was held that an action in equity would not lie in such a case. *Gaines v. Miller,* 111 U. S. 395, 4 Sup. Ct. 426. To the same effect are *French v. Hay,* 22 Wall. 231; *Boyce v. Allen,* 105 Iowa, 249, 74 N. W. 948. See, also, *Kammermeyer v. Hilz,* 107 Wis. 101, 82 N. W. 689.

The demurrer should have been sustained on the ground that there is an adequate remedy at law.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer.

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GENGER, Appellant, vs. WESTPHAL, Respondent.

April 20—May 8, 1906.

Justices' courts: Pleading: Amendment: Variance: Judgment.

At the close of the trial of an action on contract in justice's court the justice properly refused to permit the complaint to be amended so as to allege a different contract, evidence of which had been received against objection; but it was error for him afterwards to render judgment for plaintiff, the evidence having wholly failed to prove the contract as alleged.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The appeal is from the reversal of a justice's judgment in a case necessarily triable on appeal upon the record.

The complaint was to the effect that plaintiff furnished defendant at a cheese factory operated by the latter a stated amount of milk under an agreement providing that he should receive therefor the average price per hundred weight paid at any three cheese factories in Dodge county, Wisconsin, to be selected by him other than those owned and operated by corporations, less six cents per hundred weight for cartage; that the average price so paid at such factories during the months when milk was furnished by plaintiff was as alleged (the price for each month being specified), making the amount for plaintiff's milk $132.22, of which $117.76 had been paid, leaving a balance of $14.46, for which judgment was claimed.

The defendant answered by a general denial and a plea of payment for all milk delivered by the plaintiff during the period covered by his claims.

There was no evidence offered by plaintiff supporting the contract alleged as regards the price to be paid to him for milk. The amount he furnished was not disputed. He made proof, mostly under objection, that defendant agreed that he should receive for each month's delivery the price paid oth-

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ers who furnished milk for a year. The evidence on defendant's part was to the effect that no express contract was made with plaintiff as to the price he should receive for milk and that he was paid before the commencement of the action the full reasonable market value of all he furnished. There was further evidence, received without objection, that when defendant made the last payment it was by check accompanied by a statement to the effect that such payment should be in full for the balance due.

At the close of the evidence plaintiff asked leave to amend the complaint so as to declare on an agreement that he was to receive for his milk the price paid to other patrons who furnished milk for a whole year, regardless of the period covered by his deliveries. The application was denied, defendant claiming that its allowance, under the circumstances, would work prejudice to him. The justice then took time to consider and decide. Subsequently he entered judgment in favor of the plaintiff in accordance with the prayer of the complaint. In the circuit court the judgment was reversed upon the ground that the amendment was properly rejected by the justice, and that he committed error of law in subsequently rendering judgment regardless of the contract stated in the complaint.

J. C. Russell, for the appellant.

For the respondent the cause was submitted on the brief of *Sawyer & Sawyer.*

MARSHALL, J. Very little, it seems, need be said in disposing of this case. The conclusion necessarily follows from the statement that the judgment should be affirmed.

The record amply shows that no attempt was made, on the trial in justice's court, to prove the contract relied upon in the complaint. The allegations in that regard were the ones put in issue by the answer and presumably the only ones respondent expected to meet. While it is claimed by appellant that

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evidence establishing a contract liability in accordance with the amendment requested at the close of the trial, was received without objection, the record seems to indicate quite clearly to the contrary, as respondent's counsel contends. Moreover, it is by no means clear that the evidence received warranted the judgment in any event.

It was eminently proper for the justice to deny, as he did, the application for leave to amend under the circumstances. Just as clearly it was an abuse of authority for him afterwards, and after the case had been continued merely to enable him to pass upon the question of the rights of the parties under the pleadings and the evidence, to render judgment upon a claim not within the issues made by such pleadings. The circuit court was clearly right in correcting that mistake by reversing the justice's judgment.

By the Court.—The judgment is affirmed.

WILL OF KORN: KORN, Appellant, vs. FRIZ, Executor, and others, Respondents.

April 20—May 8, 1906.

Wills: Construction: "Death without issue:" Nature of estate devised: Conditions: Legacy as a lien or charge: Guardians* ad litem: *Compensation.

1. **The rule that a devise to one with limitation to others in case of his death, or death without issue, is ordinarily to be construed as referring to death during the lifetime of the testator, is one which yields readily to anything in words or context to indicate a different intention of the testator.**
2. **A will giving to the widow a life estate in all testator's land gave after her death his farm (constituting nearly half his estate) to a son "upon the express condition" that he pay to a daughter of the testator $5,000 within one year after the death of the widow, said $5,000 being devised and bequeathed to the daughter as her share of the estate. It then provided that in case of the**

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death of said son without issue all of the real estate should go to the grandchildren of the testator who might be living at the time of the death of the said son,—it being stated to be the testator's desire that said real estate be kept and retained by persons of his own blood. *Held*, that in speaking of the death of the son without issue the testator referred to a death after his own as well as to one before; and that when the son took the farm after the death of the widow he did not take an absolute fee therein.

3. The provision of the will as to the payment of $5,000 to the testator's daughter did not make the son's estate in the farm an estate upon condition; but it gave to the daughter the right to a lien or charge for that amount upon the whole title to the farm, which she could enforce or transfer to any one other than the son.
4. Under sec. 2046, Stats. 1898, the death of the son "without issue" must be construed to mean his death without issue then living.
5. The compensation of a guardian *ad litem* for minors in an action for the construction of a will must be paid by his wards and not out of the estate of the testator generally, though it may be made a charge upon their interest in such estate.
6. Where on appeal in such an action the guardian *ad litem* did not appear further than to join by signature in the brief for the respondents, including the executor, the amount of his compensation will be left to the determination of the court appointing him.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Henry Korn died March 18, 1904, leaving a will whereby, first, he directed payment of debts and expenses out of the personal property; gave to his widow the use and income of all real estate during her life, and directed the executor to pay her such income from the personal property as would provide for her comfort; and proceeded:

"After the death of my said wife I dispose of my property as follows, to wit: Third. I will, devise, and bequeath to my son *William Korn* my farm [description] upon the express condition, however, that he shall pay to my daughter, Phillipina Steele, the sum of five thousand ($5,000) dollars within one year after the death of my said wife, and which

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said sum of five thousand dollars shall be the portion hereby devised and bequeathed to my said daughter, Phillipina Steele, as her share of my estate. And it is further provided that in case of the death of my said son, *William Korn,* without issue, then and in that event I will, devise, and bequeath all of my said real estate to my grandchild or grandchildren who may be living at the time of the death of my said son *William,* share and share alike; it being my desire that said real estate shall be kept and retained by persons of my own blood."

By further paragraphs another piece of real estate is devised to a son, Jacob, on condition that, if Jacob "shall die without issue, in that event I bequeath the property so bequeathed to him by this, my last will and testament, to my grandchild or grandchildren who may be living at the time of the death of said Jacob Korn, share and share alike;" then $500 each is given to a child and a grandchild, and then to two daughters certain specified other lands, in fee simple, and all the residue, both real and personal, to the same two daughters.

Both the widow and all the children survived the testator, but at the time of the trial in circuit court the widow died. The six children were still living, and *William Korn* then had one child living, and one of the daughters had living three adult children and another daughter two minor children. Deceased left personal property of the value of about $7,400, the farm devised to *William* worth about $15,750, the farm given to Jacob worth about $3,000, and other real estate of the value of about $8,000, according to inventory. *William* made petition in county court for the construction of the will, especially the third clause thereof, alleging that he had not the means to pay Phillipina Steele her $5,000 legacy except by borrowing it upon the security of the farm, and that, to that end, it was essential that he know his title. He claimed that he took an absolute estate in fee simple upon the death of his mother to the farm mentioned, while the executor and other persons claimed that his estate therein was sub-

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ject to be terminated by his death without issue then living, with remainder over at that time to the grandchildren of the testator then surviving.

The trial court, after finding substantially the foregoing facts, adjudged that *William Korn* has in such lands an estate in fee, defeasible, however, at his death at any time without having issue surviving him at the time of his decease, and subject to the charge of the legacy of $5,000 for Phillipina Steele, and that, upon the death of said *William* without issue then surviving, his estate will then cease and the lands will then vest in fee in such grandchildren of said Henry Korn, deceased, as may be then living, and will so vest charged with said legacy of $5,000 to said Phillipina Steele so far as the same may then remain unpaid. From that judgment *William Korn* appeals.

For the appellant there was a brief by *Tullar & Lockney,* attorneys, and *C. C. Gittings,* of counsel, and oral argument by *Mr. D. S. Tullar* and *Mr. Gittings.* They contended, *inter alia,* that the language of the will being, "in case of the death of my said son, *William Korn,* without issue," etc., the rule of construction is well settled that the true intent and meaning is, "in case of *William's* death without issue *during the lifetime of the testator.*" *Vanderzee v. Slingerland,* 103 N. Y. 47; *Washbon v. Cope,* 144 N. Y. 287; *Benson v. Corbin,* 145 N. Y. 351; *Patton v. Ludington,* 103 Wis. 629; *Fishback v. Joesting,* 183 Ill. 463, 56 N. E. 62; *Arnold v. Alden,* 173 Ill. 229, 50 N. E. 704; *Biddle's Estate,* 28 Pa. St. 59; *Austin v. Bristol,* 40 Conn. 120; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 101; *Brown v. Lippincot,* 49 N. J. Eq. 44, 23 Atl. 497; *Jones v. Webb,* 5 Del. Ch. 132; *Briggs v. Shaw,* 9 Allen, 516; *Borgner v. Brown,* 133 Ind. 391, 33 N. E. 92; *Goddard v. May,* 109 Mass. 468; 2 Jarman, Wills (6th ed.) 752; 1 Underhill, Wills, §§ 465, 466; *Smith v. Smith,* 139 Ala. 406, 36 South. 616; *Smith v. Smith,* 186 Mass. 138, 71 N. E. 314; *Hoover v. Hoover,* 116

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Ind. 498, 19 N. E. 468; *Kling v. Frick,* 135 Pa. St. 575, 19 Atl. 951, 20 Am. St. Rep. 889; *Mickley's Appeal,* 92 Pa. St. 514; *McCormick v. McElligott,* 127 Pa. St. 230, 17 Atl. 896, 14 Am. St. Rep. 837; 29 Am. & Eng. Ency. of Law (1st ed.) 486. Where a testator makes a personal charge upon a devisee that he pay certain debts or legacies, as in this case, such devisee necessarily takes a fee in the property devised. 4 Kent, Comm. 540; *Doe v. Holmes,* 8 T. R. 1; *Van Alstine v. Spraker,* 13 Wend. 578; *Fox v. Phelps,* 17 Wend. 393; *Jackson v. Bull,* 10 Johns. 148, 6 Am. Dec. 321. The reason for this is that, if the devisee did not take a fee, he might be a loser by paying the debts (or legacies), and the testator is presumed to intend that his gift shall be beneficial to the devisee. *Leavitt v. Wooster,* 14 N. H. 550, cited in *Bell v. Scammon,* 15 N. H. 381, 41 Am. Dec. 706; *Olmstead v. Olmstead,* 4 N. Y. 56; *Harvey v. Olmsted,* 1 N. Y. 483; *Wright v. Page,* 10 Wheat. 204, 231; *Abbott v. Essex Co.* 18 How. 202, 215; *Fuller v. Fuller,* 84 Me. 475, 24 Atl. 946; *Korf v. Gerichs,* 145 Ind. 134, 44 N. E. 24; *Snyder v. Nesbitt,* 77 Md. 576, 581, 26 Atl. 1006; *Jackson v. Bull,* 10 Johns. 148; *Wait v. Belding,* 24 Pick. 129; *Jackson v. Merrill,* 6 Johns. 185, 5 Am. Dec. 213; *Donohue v. Donohue,* 54 Kan. 136, 37 Pac. 998; *Lindsay's Heirs v. M'Cormack,* 2 A. K. Marsh. 229, 12 Am. Dec. 387; *Heard v. Horton,* 1 Denio, 165, 43 Am. Dec. 659; *Groves v. Cox,* 40 N. J. Law, 40; *Ackland v. Ackland,* 2 Vern. 687; *Abrams v. Winshup,* 3 Russ. 350; *Blinton v. Warburton,* 2 Kay & J. 400; *Niles v. Gray,* 12 Ohio St. 320, 329; 2 Redf. Wills, 323; 2 Jarman, Wills, 248–252; Beach, Wills, § 178; 6 Am. & Eng. Ency. of Law (1st ed.) 877; 2 Underhill, Wills, § 685, and cases cited. That this is a personal charge upon the devisee, *William Korn,* see *Bowen v. Knapp,* 79 N. Y. 143.

For the respondents there was a brief signed by *Ryan, Merton & Newbury,* attorneys, and *T. W. Parkinson,* guardian *ad litem,* and oral argument by *E. Merton.* They argued, among

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other things, that under the devise in question the testator contemplated the death of *William Korn* subsequent to his own. *Hollister v. Butterworth,* 71 Conn. 57; *In re Denton,* 137 N. Y. 428, 33 N. E. 482; *Naylor v. Godman,* 109 Mo. 543; *Kornegay v. Morris,* 123 N. C. 128; Page, Wills, § 676, and cases cited. The payment of the legacy of $5,000, although a personal charge upon the devisee of the farm, is also in fact so associated with the devise itself that it becomes an equitable charge on the land until paid. *Powers v. Powers,* 28 Wis. 659; *Wiltsie v. Shaw,* 100 N. Y. 191, 195; *Loder v. Hadfield,* 71 N. Y. 92, 97; *Thayer v. Finnegan,* 134 Mass. 62, 65; *Merrill v. Bickford,* 65 Me. 118; *Harris v. Fly,* 7 Paige, 421; *Larkin v. Mann,* 53 Barb. 267, 270; *Kelsey v. Western,* 2 N. Y. 500; *Gridley v. Gridley,* 24 N. Y. 130; *Glen v. Fisher,* 6 Johns. Ch. 34.

Dodge, J. The appellant does not contend against the proposition that the gift over to grandchildren is so associated with the gift to the son *William* that it evinces the intention of the testator not to give an absolute fee to *William* unless the condition of the limitation over to such grandchildren, namely, that *William* shall die without issue, refers to such death during the lifetime of the testator. This, however, he contends is the true construction, and invokes the rule, long recognized, that such a phrase as a gift to one with limitation to others in case of his death, or death without issue, ordinarily is to be construed as applying only to the condition of things prior and up to the death of the testator. *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073. This rule, however, like all others with reference to construction of wills, is but a rule of probability and yields readily to anything in words or context to indicate a different intention of the testator, which, as so often said, is the ultimate object of search and discovery in all attempts to construe wills. *Benson v. Corbin,* 145 N. Y. 351, 40 N. E. 11; *In re Donges's Estate,* 103 Wis. 497, 79 N. W.

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786. In considering the present will, and especially the third paragraph thereof quoted in the statement of facts, we find at least three facts strongly indicating that the testator in mentioning the event of the death of his son *William* without issue, as to which he desired to provide, referred to a subsequent demise. First, it is to be noted that *William* himself was not to take immediately upon his father's death, but was postponed to the death of the widow. Such fact is by the authorities considered significant of contemplation by the testator of the death of the remainderman at some time subsequent to his own. Page, Wills, § 676. Again, there is industriously added to this third paragraph a declaration of testator's desire that his property shall, so far as he can control it, pass to those of his own blood. While it is not seriously contended that this either confers any title as an express devise, or would serve to qualify any title clearly given, yet it at least bears upon the probability that the testator had in mind only the contingency of *William's* death before his own. This generally expressed desire of persistency of title amongst his own descendants would be quite as much defeated by *William's* death without issue after testator's as before, for, upon *William's* death, either during the life of the widow or afterwards, if either his remainder or title became absolutely vested in fee, his wife would be his heir at law or he would be free to dispose of the property by will, or deed, to others than his father's descendants. But more significant yet is the fact that the limitation over is to a class to be ascertained and determined, finally and irrevocably, at the moment of *William's* death, and which might well consist of different persons at any moment of time. That class is "my grandchild or grandchildren who may be living at the time of the death of my son *William*." It is inconceivable that in that sentence the mind of the testator was fixed upon a period prior to his own death. With several married children, and no apparent reason for preferring one grandchild to another, it is, of course, in the

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highest degree improbable that he meant by this will to fix a date, perhaps years before his own death, at which the grandchildren who should share this large portion of his estate should become determined to the exclusion of others who might be born later, and with the resulting right to children of any of the grandchildren living at *William's* death who might die between that date and the testator's. These indicia are quite sufficient to convince us that wherever the expression "death of *William* without issue" was used by testator in this third paragraph he contemplated a death subsequent to his own quite as much as one before.

Perhaps the most forcible argument against this conclusion is that the payment of $5,000 to Phillipina Steele by *William* is thereby rendered difficult, if not impossible, and that, presumptively, the testator, knowing of *William's* limited financial ability, could not have intended such a situation. It is doubtless true that, if *William* has a base fee determinable at any moment by his death, his estate is of such uncertain value as to render very doubtful whether he could borrow such a sum as $5,000 upon its security. To this it might be answered that, from a practical business point of view, *William's* mortgage upon the land covering an estate determinable only at his death, supplemented by a safe life insurance policy, might well provide reasonably perfect security, so that it can hardly be said that payment of this legacy would be impossible, though there might still be doubt whether, for so uncertain a tenure, *William* would be willing to make the payment. But if it shall be determined, as it was by the trial court, that to Phillipina is given an absolute charge or lien upon this land, as land, and not alone upon *William's* estate therein, then there would be a situation where she would have a right absolute and assignable to another; an assignment of which being added to a mortgage by *William* would give to any one furnishing the money to satisfy her legacy an unquestionable right to exhaust this $15,000 worth of land to the ex-

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tent necessary for his reimbursement. Hence, if such charge was intended by the testator, he did not create a situation where payment was at all impossible.

This naturally brings us to a consideration of the intent with reference to this legacy. The will does not, in terms, provide that the same should be a charge, but uses the expression that the devise to *William* is upon the condition that he shall, within one year after the widow's death, pay this amount to Phillipina. The expression "upon condition," if not otherwise qualified, might be construed as a condition precedent so that *William* could not take the land at all without making such payment, but since he was to take in possession immediately upon his mother's death, and was not required to make the payment until afterwards, namely, within a year, of course no condition precedent was intended. If, then, it is a condition at all, it is a condition subsequent; but there is no suggestion that his title is to be divested upon breach of that condition, and no provision is made for any one else to take the land upon such breach. Hence, it seems necessary to deduce some other practical meaning and purpose from this language. We are persuaded that the trial court reached substantially the right conclusion on this subject. We think it plain that this $5,000 provision for the daughter—all that she receives under the will—was a very dominant purpose in the mind of the testator, and that his wishes, as evinced by the will, would not be satisfied unless she receives it; hence that he intended to declare his will that out of this farm, constituting nearly half of his estate, should be paid, in any event, $5,000 to the daughter Phillipina; that this purpose should not be defeated either through *William's* inability to raise that amount of money upon his limited estate therein, or otherwise. To reach this result he must have intended to confer upon her the right to a lien or charge for this amount upon the whole title in these premises, and we agree with the trial court in holding that the will does so. Such lien or charge being

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created, of course the right exists in her to invoke the powers of a court, whether of law or equity, to exert its proper machinery to render that lien effective in producing the money she is entitled to have. Courts of equity have many such methods within their power, prominent among which is the judicial sale, whereby any title or any portion found necessary may be transferred to a purchaser who will pay the amount of money requisite to satisfy the charge. We think it proper to declare, also, that, she being *sui juris,* her right to this legacy, with all its accompanying security, can be sold or transferred by her like any other property, so that any one, other than *William,* paying to her the $5,000 to which she is entitled may, with her co-operation, acquire all her rights in the land. We presume that the trial court intended to declare, by its judgment, a charge of this character, and no modification or change of the judgment, so construed, is necessary.

It is suggested rather than contended that the condition upon which *William's* estate is to terminate, namely, his death without issue, is already rendered impossible by the fact of issue born to him. Doubtless there are many cases in which courts have held that "death without issue" may mean death without issue born, but that construction has been excluded, except where clearly intended, by our statute (sec. 2046, Stats. 1898), which provides that "when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor."

A guardian *ad litem* was appointed for the protection of the interests of minors. He did not appear in this court further than to join by signature in the brief for the respondents, including the executor. He asks that compensation be allowed him, to be paid out of the estate. Upon this subject our views have been so fully expressed in *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439; *Kronshage v. Varrell,* 127 Wis. 597, 107

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N. W. 342; *Stephenson v. Norris, ante,* p. 242, 107 N. W. 343, that we do not need to enlarge upon them. The compensation to the guardian *ad litem* must be paid by his wards and, to the extent of any property or estate belonging to them in this litigation, it may be made a charge thereon. These things can all be done by the court appointing the guardian *ad litem.* Had his services upon the appeal been performed in the presence of this court so as to give it any advantage over the county court in knowledge of their character, we should probably fix the amount of reasonable compensation therefor, as was done in *Stephenson v. Norris, supra.* But in the present instance we have no such knowledge, and the county court can as well acquire the information necessary to fix such amount.

By the Court.—Judgment affirmed; neither party to tax costs against another in this court; appellant to pay clerk's fees.

HALSEY, Appellant, vs. WAUKESHA SPRINGS SANITARIUM, imp., Respondent.

April 20—May 8, 1906.

Appeal: Mandate for judgment below must be followed.

Where a judgment is reversed and the cause remanded to the trial court for further proceedings and to render judgment in favor of a party in accordance with the opinion of the appellate court, the lower court has no authority to reframe the pleadings as to any issue and retry them. It can only render judgment as directed.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

After the filing, on a former appeal of the case (125 Wis. 311, 104 N. W. 94), of the *remittitur* from this court, the trial court permitted defendant to amend the answer, and reconsidered the evidence which was included in the bill of ex-

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ceptions prepared for the former appeal, and which was offered upon the question of the amount to be deducted from plaintiff's claim for his failure to furnish defendant a mixing table as prescribed by the specifications. Upon such proceedings the court rendered judgment deducting $480 from plaintiff's claim instead of $150, the amount claimed by defendant in its original answer and contention before this court on the former appeal. The mandate of this court under the former decision was: "Judgment reversed, with directions to take further proceedings and render judgment in plaintiff's favor in accordance with the foregoing opinion." This is an appeal from that part of the judgment allowing such deduction, entered after *remittitur* on the former appeal.

For the appellant there was a brief signed by *C. H. Hamilton* and *Howard Van Wyck,* attorneys, and *Timlin & Glicksman,* of counsel, and oral argument by *J. J. Cook.*

For the respondent there was a brief by *Tullar & Lockney* and *Ryan, Merton & Newbury,* and oral argument by *D. S. Tullar* and *E. Merton.*

SIEBECKER, J. One of the questions presented by the former appeal was the amount defendant should be allowed against the claim made by the plaintiff as a credit for the failure to furnish a mixing table according to the specifications. Under the decision rendered therein by this court it became necessary to determine whether or not defendant was entitled to a credit for this table, which credit had not been allowed by the plaintiff under the demand of his complaint. This court, in passing on that question in the former decision, said:

"The item of $150 deduction for a mixing table, rejected by the architect as not in accord with specifications, cannot be allowed, although there is much evidence to dispute the architect's decision. On that subject he did act within his agreed jurisdiction, and his ruling is conclusive. There is no evidence to support any other deductions from the amount demanded by the complaint."

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In actions of this kind it is clearly the well-established rule that, where the judgment is reversed and the cause remanded to the trial court for further proceedings and to render judgment in favor of a party in accordance with the opinion in the cause, it has no authority to reframe the pleadings as to any issue and retry them. The only course open to it is to render judgment in accordance with the opinion of this court. Whether the judgment was rightly or erroneously pronounced is no longer debatable, and for the purposes of the case all questions involved in it are irrevocably settled. The circuit court clearly exceeded its authority in permitting the pleading to be amended and in retrying this question. *Whitney v. Traynor,* 76 Wis. 628, 45 N. W. 530; *Ean v. Chicago, M. & St. P. R. Co.* 101 Wis. 166, 76 N. W. 329; *Ledebuhr v. Wis. T. Co.* 115 Wis. 214, 91 N. W. 1012; *Bostwick v. Mut. L. Ins. Co.* 122 Wis. 323, 99 N. W. 1042.

By the Court.—The part of the judgment appealed from is reversed, and the cause remanded with directions to the court to enter judgment in accordance with the opinion of this court upon the former appeal in this action.

GREILING, Respondent, vs. WATERMOLEN, Administrator, Appellant.

April 20—May 8, 1906.

Administrator's sale of land: False representations as to width of street: Rescission: Actual damage: Estoppel: Appeal from county court: "Person aggrieved."

1. **Findings of the trial court to the effect that a diagram made by an administrator and used by him at a public sale of lots falsely represented that a street upon which said lots abutted was sixty feet wide, when in fact it was but twenty-four feet wide, are *held* to be sustained by the evidence.**

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2. Where one was induced by the vendor's false representations to purchase land which, had such representations been true, would have been worth considerably more than it in fact was, he is entitled to a rescission even though the land was actually worth what he paid for it.
3. At the time of a sale of lots by an administrator it was understood that the purchase moneys were to be used in discharging mortgage and tax liens on said lots and upon other land, and that the purchasers were to have title free from all incumbrances. Without waiting for confirmation of the sale the administrator so applied said moneys. *Held,* that a purchaser who thereafter discovered that the administrator had made false representations as to the width of the street on which the lots fronted was not estopped, by reason of the administrator having paid out the purchase money with his knowledge and consent, from rescinding the sale.
4. One who, having been induced by false representations to purchase land from an administrator, has demanded rescission of the sale and opposed confirmation thereof, is a person aggrieved by an order of the county court confirming the sale, and may appeal from such order.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

It appears from the record and the trial court found, in effect, (1) that Thomas McLean died intestate, leaving no personal property, but leaving, among other real estate, lots 7, 8, 11, and 12 in Catherine McCole's addition to Green Bay, subject to mortgage and tax liens for more than $2,000; that subsequently and on May 14, 1903, the appellant, *John F. Watermolen,* was duly appointed administrator of said estate and thereupon qualified as such; that he was thereupon duly licensed by the county court to sell the real estate of the deceased to pay the debts against said estate, amounting to more than $2,400; that he gave notice of public sale of such real estate to be held on October 10, 1904; (2) that as such administrator and for the purpose of informing prospective bidders and purchasers, including *Herman Greiling,* of the situation, location, and streets of said lots he made and exhibited a dia-

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gram purporting to show the situation of said property, its location, and the width of the streets abutting thereon, and of the relative situation of McCole's plat and the McLean plat adjoining the same on the south, with Catherine street running east and west on the line between the two plats; that said lots 7, 8, 11, and 12 were represented by said administrator on said diagram as facing Catherine street and abutting thereon, and said street was thereon and thereby represented to be sixty feet in width; (3) that such representation as to the width of Catherine street was and is false and untrue; that as a matter of fact Catherine street was and is only a narrow street or lane twenty-four feet in width; that said administrator at the time of such misrepresentation and at the time of such sale to said *Greiling* erroneously supposed that said Catherine street was sixty feet in width; (4) that said administrator, in the diagram so exhibited by him to prospective bidders, attempted to show the relative situation of said two plats, which were in fact recorded separately and without reference to each other; that said diagram did not correctly set forth the relative situation to each other in and as to the width of Catherine street, but showed the same to be sixty feet in width, whereas a correct representation of their situation in reference to each other, as shown on such plats so separately recorded, would have shown that there was only twenty-four feet existing between them to make up the width of Catherine street; (5) that said *Greiling* was present at the public auction of said lots, but no bid upon said lots equal to the appraised value thereof was received at such public auction; that a few days thereafter *Greiling* purchased of said administrator the said four lots at their appraised value; that in making such purchase said *Greiling* relied upon said representation as to the width of Catherine street and would not have purchased said lots at such figure had he known that such representations as to the width of Catherine street were false; that said four lots are

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worth considerably less situated upon an alley twenty-four feet in width than they would have been had Catherine street been sixty feet in width; (6) that at the time of such purchase *Greiling* paid to said administrator the full purchase price in cash; that shortly thereafter he learned the true width of Catherine street, and thereupon promptly notified said administrator that he demanded a rescission of such sale by reason of such misrepresentation and that he stood ready to reconvey upon the repayment to him of the amount so paid therefor to said administrator, and at all times since has been and now is ready and willing to reconvey said property as said administrator has at all times been fully advised; (7) that said administrator has at all times refused so to do, but persists in retaining such purchase money, and after such demand for rescission said administrator took proceedings in the county court against the protest and objection of said *Greiling* and secured, and on February 1, 1905, had entered, the order and judgment ratifying and confirming said sale of said lots, from which order and judgment *Greiling* appealed to the circuit court; (8) that said administrator at said public auction told the bidders that the real estate offered for sale was subject to a mortgage and tax liens, but that the moneys raised would be used in payment of such claims, and that the bidder would get the land purchased free and clear of all claims; that in making such purchase *Greiling* made no investigation, but relied wholly upon said administrator to give him a full and clear title to the lots so purchased and paid for by him; that said administrator received from such public and private sales and other sources $2,835, and paid out and disbursed for mortgage and tax liens and other expenses $2,630.10, and retains the balance in his hands; that such disbursements were so made by said administrator previous to the confirmation of the sale of said lots or to any order of the court made therein; that all the property of said estate has been disposed of except what

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is still so in the hands of the administrator and the homestead occupied by the widow; (9) that the four lots so purchased by *Greiling* for $100 each were so purchased on speculation.

As conclusions of law the court found, in effect, that *Greiling* was entitled to judgment against said estate, reversing the order and judgment of the county court appealed from so far as the same ratifies and confirms the sale of the four lots described to said *Greiling,* and that said matter be remitted to the county court for further proceedings in accordance with the opinion of the trial court on file, and that the county court allow to said *Greiling* out of said estate his taxable costs and disbursements on the appeal to the circuit court, which were therein directed to be taxed and entered in the judgment in the circuit court. From the judgment so entered, with costs, the said administrator, *John F. Watermolen,* appeals.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

Sol. P. Huntington, for the respondent.

CASSODAY, C. J. 1. Error is assigned because the trial court held that the diagram made and used by the administrator at the public sale, as mentioned in the foregoing statement, falsely represented Catherine street to be sixty feet wide. It is conceded that the lots in question are situated in the southern tier of lots in McCole's addition and abut on Catherine street on the south; that that addition is wholly on private claim No. 9; and that the recorded plat of McCole's addition shows that the south line of said private claim No. 9 is twenty-four feet south of the south line of said lots, that said Catherine street is sixty feet wide, and that the south thirty-six feet thereof is in private claim No. 10. It seems that at the time of the public sale the street and lots in question were all one common, and that, although the street was open, it was not graded or worked, and that by looking at the place it could not be told whether there was any street there or not. It is also con-

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ceded that the McLean plat is wholly in private claim No. 10, and that the north line thereof abuts on the south line of Catherine street; but it is contended on the part of the administrator that "there is nothing on the recorded McLean plat to indicate but what the south line of Catherine street as shown on the McCole plat is the north boundary line of the McLean plat," for the reason that the starting point as given in the certificate on the McLean plat is indefinite and uncertain as to that point in reference to Catherine street. In other words, the claim is that there is nothing on that plat to indicate whether the north line thereof is the north line of private claim No. 10 or thirty-six feet south of that line. The certificate of the McLean plat shows that it

"is situated and laid out on *all* that part of private claim No. 10 east side of Fox river, which is laying between the continuation of Webster street of the city of Green Bay and the continuation of Monroe avenue or the River Shore road leading from Green Bay to village of Depere. The lots in said addition are marked and numbered, and the length and width of each lot, as also the course and distance, are expressed in figures as the plat sets forth. The starting point of survey is at the northwest corner of lot 20 at Van Buren street, the line and direction of which is intended in all cases to correspond with Van Buren street in the city of Green Bay."

In other words, the plat is bounded on the east by the continuation of Webster street and on the west by the continuation of Monroe avenue and is coextensive on the north and south with the width of private claim No. 10. Among the proposed written findings which the trial court was requested by the administrator to make, is one which reads as follows:

"That Catherine street in question appears on the recorded McCole plat and also on diagram made and used by the administrator, to be a sixty-foot street, but that in fact it is only twenty-four feet wide, being the twenty-four feet in private claim 9."

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In the carefully written opinion of the trial judge it is said, in effect, that the lots in the McLean plat "come clear to the north line of private claim 10 and the south line of private claim 9, leaving nothing for Catherine street" except the twenty-four feet mentioned; and that that fact could have been "ascertained by observing the fact that the north tier of lots in the McLean plat comes clear to the south line of private claim 9, and the lots fronting on Catherine street on the McCole plat come within twenty-four feet of the same line;" and that "a careful inspection of the McLean plat shows that the north tier of lots comes to the line between claims 9 and 10." Such conclusions seem to be supported by the record. Certainly, we cannot say that the finding of the trial court, as to the false representations in regard to the width of Catherine street, is against the clear preponderance of the evidence.

2. It is claimed by the administrator that the lots purchased by *Greiling* were actually worth what he paid for them and hence that he had sustained no damage and therefore was not entitled to a rescission of the sale. The only evidence tending to show that the lots were worth what *Greiling* paid for them is that, some four months after he purchased, two adjoining lots of equal value were sold by the administrator at private sale for $107.50 each. It appears and is manifest that they were worth considerably less by reason of fronting on a street only twenty-four feet wide than they would have been had they fronted on a street sixty feet wide, as was supposed by both parties at the time of the purchase. By the false representations mentioned *Greiling* was induced to make the purchase. He was entitled to a rescission by reason of such false representations, without proof of actual damage. This seems to be well settled by numerous adjudications in this court. *Miner v. Medbury,* 6 Wis. 295; *Mecklem v. Blake,* 22 Wis. 495; *Booth v. Ryan,* 31 Wis. 45; *Risch v. Von Lillienthal,* 34 Wis. 250; *McKinnon v. Voll-*

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mar, 75 Wis. 82, 43 N. W. 800; *Bergeron v. Miles,* 88 Wis. 397, 60 N. W. 783; *Hansen v. Allen,* 117 Wis. 61, 93 N. W. 805.

3. We perceive no error in holding that *Greiling* was not estopped from rescinding the sale by reason of the administrator having paid out the purchase money with his knowledge and consent. As indicated in the findings of the court, it was understood and agreed at the time of the public sale and the time of completing the purchase that the real estate, including the homestead, was incumbered by mortgage and tax liens, and that the purchase moneys were to be used by the administrator in paying and discharging such liens, and that each bidder and purchaser, including *Greiling,* was to have title free and clear of all incumbrances; and such understanding and agreement appears to have had the sanction of the mortgagee and the county court. After *Greiling* had paid the purchase price of the lots and on November 22, 1904, the administrator paid the amount of the mortgage, $2,142.80, to the mortgagee, and on the next day he made and filed his second report in the county court, and thereupon the time fixed by that court for the hearing of that report was December 6, 1904. Four or five days prior to the time so fixed for such hearing *Greiling* was told by Delmarcelle, the purchaser of another lot, that Catherine street was only twenty-four feet wide, and thereupon he offered to reconvey the lots if the administrator would pay back the purchase money, but he refused to do so on the ground that he had already paid out the money. *Greiling* then opposed the confirmation of the sale, but the same was confirmed by the county court February 1, 1905. As indicated in the foregoing statement, the circuit court, on *Greiling's* appeal, reversed the order and judgment of the county court confirming such sale, and held that there was nothing in the circumstances which stood in the way of *Greiling* being relieved from his purchase; that it was not a question between *Greiling* and the individual

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who happened to represent the estate, but between *Greiling* and the estate; that, if the administrator had acted without authority in disposing of the money of the estate, it was a matter between him and the estate; that with the sale not confirmed the estate still owned the lots in question, and the administrator was responsible to it for the money he should have in his hands. It appears from the findings that the administrator is protected. The statute expressly authorizes the court to vacate such sale and direct another to be had, in case it should be of opinion that the proceedings in making such sale were unfair. Sec. 3896, Stats. 1898. It is only when it is made to appear to the "court that the sale was legally made and fairly conducted" that the same is to be confirmed. Id. We perceive no error in holding that *Greiling* was not estopped by the circumstances mentioned from rescinding such sale.

4. There can be no question that *Greiling* was aggrieved by the order and judgment of the county court confirming the purchase which he was induced to make by the false representations of the administrator. This court has held that any person who has acquired an interest in the land under a sale made by an administrator or executor by order of the county court is aggrieved by an order of that court vacating the proceedings and therefore may appeal therefrom. *Betts v. Shotton,* 27 Wis. 667; *Estate of Leavens,* 65 Wis. 440, 446, 447, 27 N. W. 324, and cases there cited; *Estate of O'Neill,* 90 Wis. 480, 63 N. W. 1043; *Levi v. Longini,* 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333. The converse of the proposition is equally true.

By the Court.—The judgment of the circuit court is affirmed.

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THE STATE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

SAME, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

SAME, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY, Appellant.

SAME, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 24—June 21, 1906.

APPEAL. (1) *Review: Questions considered.*

TAXATION OF RAILROADS. (2–16) *History and construction of statutes: License fees in lieu of taxes: Constitutional rule of uniformity does not apply.* (10–12) *Return of gross earnings: Approval by railroad commissioner: Effect.* (13) *Power to revoke license.* (14, 15) *Decision in Mil. & Miss. R. Co. v. Waukesha Co. 9 Wis. 449.* (17) *Ordinary tax not a debt.* (18–26) *Privilege taxes involve contract obligations: Not taxes in constitutional sense.* (21–23) *Impairing obligation of contracts: Amending corporate charters.* (26) *Foreign and domestic corporations.* (27–32) *Penalty for nonpayment of tax or license fee: Excusable default: Mistake in making return of gross earnings: Construction of penal statute: Intent of legislature.*

1. Where the right of a matter to be determined upon appeal, with the logical basis therefor as regards legal principles, cannot be clearly discovered and satisfactorily stated without such a broad view of the matter as to include important matters of difference in other pending or known to be impending litigation, though the same were not presented by counsel, through oversight or otherwise,—that broad consideration of the case should be taken, rather than that justice in the particular case should be jeopardized or left in any uncertainty as to the grounds for the result reached. pp. 470–473.
2. Ch. 74, Laws of 1854, the original act in this state for obtaining public revenue from railroads, is the same, in all essential features, as secs. 1211 to 1214, inclusive, Stats. 1898, except as modified by ch. 174, Laws of 1860. p. 475.
3. The sections of the present statutes mentioned, except as they have been displaced by the *ad valorem* method of obtaining revenue from railroad companies, have not been changed except by

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ch. 308, Laws of 1899, providing that the license shall issue only on approval by the railroad commissioner of the return required by sec. 1211. p. 481.

4. The original law did not impose a tax on railroad property, or a tax at all, within the meaning of sec. 1, art. VIII, of the constitution, though it did impose a tax "in the just and proper sense of that term" in that it imposed on the owners of property the duty of contributing, indirectly, on account thereof to the public revenue. pp. 484, 485, 490.

5. The basic ideas of the law of 1854 are (1) an exemption of railroad property from ordinary taxation, such as is dealt with by the constitutional provisions on the subject; (2) an exaction, tax so called, in lieu thereof and in consideration of the exemption, based on the business in which the property is used. pp. 490, 491.

6. The idea that an exaction in lieu of taxation mentioned in the constitution is such taxation in fact, is a palpable *non sequitur*. p. 490.

7. Ch. 174, Laws of 1860, in connection with a companion enactment, neither, however, referring to the other, preserved the features of the law of 1854 as regards an exaction from the owner of railroad property, based on the business of the road, in lieu of and as compensation for exemption of such property from ordinary taxation—that under the constitutional provision referred to—but omitted all features giving rise to the controversy as to whether it was the latter, and added those features suggested in previous opinions in this court, as giving such an exaction the character of compensation for the privilege of operating the road. pp. 493–496.

8. Sec. 1212 of the Statutes imposed an absolute obligation on every railroad company doing business in this state, to pay to the latter the proportion of gross earnings mentioned in sec. 1214, as compensation for the privilege of operating its road. p. 500.

9. The other features of secs. 1211 to 1214, inclusive, are administrative in character, and intended only to secure certainty of performance as to the obligation created by sec. 1212. p. 503.

10. The purpose of the return of gross earnings required by sec. 1211, is to enable the state to determine the proportion of such earnings to which it is entitled as compensation for the privilege accorded of operating the road for the ensuing year, and, though approved by the railroad commissioner, it is only *prima facie* binding as to the real right of the matter. p. 503.

11. The duty of the railroad commissioner under the law of 1899, as to approving the return of gross earnings made under sec. 1211, is administrative in character. The legislative idea is that the

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return, only when approved as required, shall be *prima facie* evidence of the correct basis for determining the amount to be paid to the state. p. 480.

12. The law of 1899 contemplates that the approval of the return shall precede the application for the license. p. 478.
13. The power of revocation of the license, reserved in sec. 1212, is exercisable in case of any default in performing the obligation created by such section and acceptance of the privilege. p. 514.
14. The statement of points decided by this court as to whether ch. 74, Laws of 1854, imposed a tax in a constitutional sense, which appears in vol. 9 of the official reports at page 449, is a *verbatim* copy of the decision of the question made by this court November 17, 1855. pp. 491, 492.
15. The determination so made as to the law of 1854 not imposing a tax "within the meaning of the constitutional provisions" has been the settled law of this state since 1862, and so far as the features of such law, in letter or spirit, are included in secs. 1211 to 1214, inclusive, such decision establishes the character thereof as regards whether they deal with taxation in a constitutional sense. pp. 497, 498.
16. The character of the law of 1854 as regards not imposing a tax "within the constitutional provisions" is emphasized in secs. 1211 to 1214 aforesaid, in that by exclusion and inclusion the idea of a tax in a constitutional sense was carefully omitted therefrom and repelled by its affirmative features, and the idea of a privilege tax resting on contract obligations was included. p. 496.
17. A tax in the ordinary sense is not a debt: it does not involve any element of contractual obligation and is not enforceable by ordinary remedies for the collection of debts, without statutory authorization in that regard. pp. 485, 500–503.
18. A privilege tax involves contract obligations. The acceptance of the privilege implies a promise to pay the statutory equivalent therefor, and the obligation may be enforced by ordinary remedies for the enforcement of ordinary contract obligations. p. 500.
19. The ideas involved in a privilege tax are these: The state offers a privilege on condition of being compensated therefor. The acceptance of such offer creates a contract. The law operating upon the acts of the parties raises the implied promise to pay the required compensation. The full consummation of the transaction involves the exchange of equivalents, the same as in any other case of an executed contract. p. 500.
20. The privilege tax exacted from a corporation for opportunity of conducting its business in this state is not within sec. 1, art. VIII, of the constitution. It is referable to the taxing power

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in the general sense, the contracting power, the right reserved to amend corporate charters, and the right to exempt property from taxation. pp. 505, 507.

21. The grant of a charter to a corporation and its acceptance create a contract between the grantor and the grantee, within the protection of the constitutional inhibition as to laws violating the obligations of contracts. p. 505.

22. The contract between the corporation and the state, made as aforesaid, is subject to alteration under the power reserved in the constitution to alter or amend corporate charters, which is deemed to be embodied in every such charter. p. 505.

23. When a corporate charter, originally or by amendment under the reserved power of the legislature in that regard, conditions the exercise of a corporate privilege upon the corporation paying to the state a proportion of its income, the acceptance of the charter, originally or as amended, by operating under it, creates a contract between the state and the corporation. The exaction, when plainly made for revenue, is a tax in "the just and proper sense of the term:" in the broad view which includes all public revenues derived from persons, natural or artificial, but is, at the same time, a debt, not a tax in the constitutional sense: a tax merely involving the reciprocal duties between sovereign authority and those enjoying its benefits. pp. 505, 509.

24. Sec. 1212 of the Statutes imposes an obligation for payment to the state by every railroad company of the full stated percentage of its gross earnings, as a consideration for the privilege of operating its road. The acceptance of the privilege creates a debt to the state for the full amount thereof. pp. 500, 506.

25. Upon acceptance by a railroad company of the offered privilege to operate its road by actually operating the same, the obligation to pay the stated compensation therefor becomes fixed, rests on contract, and is fully redeemable only by fully paying the same, as in case of any other absolute obligation to pay money. p. 506.

26. There is no difference, as regards the contract basis, between exactions from foreign corporations and those from domestic corporations for the privilege of doing business in this state. p. 505.

27. A penalty imposed by the statute for failing to perform a legal duty as regards payment of a tax, strictly so called: a tax not involving any contract element, when incurred becomes, in effect, a part of the tax, and cannot be avoided whether the default be excusable or inexcusable from a moral standpoint. It cannot be forgiven at all, any more than the tax itself, in the absence of legislative authorization to that effect. pp. 498, 499.

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28. The pecuniary penalty feature in sec. 1214, enforceable in respect to failure to pay any portion of the compensation due the state from any railroad company for the privilege of operating its road, being an instrumentality for the enforcement of a tax characterized by a contractual obligation to pay it, it does not necessarily follow from such a default that the penalty is collectible regardless of whether such default is excusable, testing the matter by principles of natural justice. pp. 511, 512.
29. In case of a penal statute in aid of the enforcement of contractual obligations, such strict construction thereof in favor of the party upon which it bears is permissible as will avoid so reading it as to violate principles of natural justice, in the absence of unmistakable language in the act to the contrary. Such a statute if necessary to avoid manifest oppression may be construed by quite as arbitrary a rule as is applied to a penal feature in an ordinary contract. p. 512.
30. When the literal sense of a statute, if adopted as the legislative meaning, would lead to some absurd result, or shock the ordinary sense of justice, it is to be rejected, if some other meaning which is reasonable can be readily read therefrom by the aid of any rule for judicial construction which is applicable, and can reasonably be seen to be the real intent of the legislature. pp. 512, 513.
31. The pecuniary penalty of $10,000 for any default specified in sec. 1214,—as applicable to mere mistakes of law or fact or both, not involving inexcusable neglect or moral turpitude, or difference of opinion fairly warranting resort to judicial assistance for the discovery of the truth,—would be so unreasonable as to strongly suggest that no such purpose was intended by the legislature, in the absence of language unmistakably showing to the contrary. p. 515.
32. The term "absolutely forfeit," as used in sec. 1214, does not so unmistakably show as aforesaid. It may reasonably be read as meaning that in case of the penalty being incurred by reason of a default not attributable, reasonably, to excusable mistake of law or fact or both, or some controversy fairly warranting resort to judicial aid for its solution, the forfeiture shall be absolute as in case of a penalty in aid of the collection of an ordinary tax, or stipulated damages in aid of an ordinary contract. pp. 515, 516.

[Syllabus by MARSHALL, J.]

DODGE, J., concurs in the judgment on the one ground that sec. 1214, Stats. 1898, should not be construed as imposing a penalty in case of an entirely innocent mistake of fact or law

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in a *bona fide* effort to comply with secs. 1211, 1212. Beyond this one point he considers the discussion contained in the opinion of the court immaterial and unnecessary. He looks upon the imposition of license fees under these statutes as "taxation" within the meaning of sec. 1, art. VIII, Const., and dissents from the doctrine that contractual obligations are involved therein. pp. 517, 518.

CASSODAY, C. J., concurs in the judgment, but dissents from so much of the opinion as holds that the exactions from railroad companies under the license system were not "taxes" upon property, within the meaning of sec. 1, art. VIII, Const. p. 519.

APPEALS from judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The purpose as to each of the four causes is to recover $10,000 as penalty under sec. 1214, Stats. 1898, for noncompliance with the law relating to payment to the state of the percentage of defendant's gross earnings, due the state for 1903 under sec. 1213, Stats. 1898. The complaint by appropriate allegations stated a cause of action under such section. Issues were joined in due form and the truth of the matter as to the questions thus raised was found by the court in accordance with written stipulations filed. Such facts, as so stipulated, are as follows:

"1. The defendant in making its statement of its gross earnings for the calendar year 1902, as a basis for computing its license fee of 1903, payable to the state, omitted therefrom gross earnings amounting to a substantial sum earned in the year 1902, and failed and neglected to pay to the state any portion of the license fee on gross earnings so omitted from said statement, but the officers of defendant, who made such statement of its earnings, shall be deemed to have testified in this case that, in respect of such omissions from defendant's statement, they acted and relied upon advice of counsel, learned in the law, to the effect that the items so omitted did not constitute gross earnings under the statute; which advice they believed. The plaintiff, for the purpose of this case only, makes no contention to the contrary of such testimony, but objects to the consideration of the same as incompetent and immaterial. The defendant

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now admits that some of the items so omitted from said statement constituting of themselves a substantial sum were in fact gross earnings.

"2. The gross earnings of 1902, which defendant reported in 1903, pursuant to sec. 1211, Stats. 1898, and on which it did pay four per cent. to Wisconsin for its license fee for 1903, included in the total of $14,893,720.29 of earnings set forth in such report the sum of not less than $7,000,000 of earnings from interstate transportations of passengers and freight, which were only partly in Wisconsin, and such portion of interstate earnings credited to Wisconsin was derived by attributing to Wisconsin such part of the total interstate earnings on the transportation of passengers and freight across the state or from points outside to points within the state, or *vice versa,* in such proportion as the carriage in the state bore to the whole miles of carriage, both without and within the state, in each instance.

"3. If the defendant was not required to pay to the state of Wisconsin as a part of its license fee four per centum on the gross earnings from interstate business, as ascertained in the manner stated in paragraph 2, then it did pay for its license fee of 1903 more than four per centum on its full gross earnings.

"4. The defendant did pay to the state treasurer of Wisconsin under secs. 1211–1213 for its license for 1903, four per centum on its gross earnings, as set forth in its report to the state treasurer, after such report had been approved by the railroad commissioner, pursuant to ch. 308, Laws of 1899; and defendant paid to the treasurer of Wisconsin in proper time the full license fee named in the license which was issued to defendant for 1903, including the second instalment thereof.

"5. Defendant has paid, without objection, to the state of Wisconsin for its licenses of successive years issued under secs. 1211–1213, Stats. 1898, on its interstate earnings apportioned to Wisconsin in the manner described in paragraph No. 2, since the year 1876, continuously; and in making its report of earnings of 1902 defendant proceeded upon the same interpretations of secs. 1211–1213, and upon the same views of the various questions as to what were gross earnings under said statute, as it had entertained and acted upon for many years.

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"6. Copies of the following three papers, viz.: Defendant's report of its gross earnings made to the treasurer of Wisconsin in February, 1903; defendant's report to the railroad commissioner of Wisconsin made in 1903; the license issued by the treasurer of Wisconsin to the defendant for the year 1903, are attached hereto and made a part of this stipulation of facts.

"7. During the year 1902 defendant was a railroad corporation doing business in this state as well as eight other states and earned upwards of $3,000 per mile upon its operated road in this state.

"8. The facts admitted in the pleadings in this action shall be considered as a part of this stipulation."

On such facts the court found in favor of the plaintiff in each of the four causes for the full amount claimed. Judgment was entered accordingly, and the defendants severally appealed.

For the appellant *Chicago & Northwestern Railway Company* there was a brief by *Edward M. Hyzer* and *Burr W. Jones,* attorneys, and *Lloyd W. Bowers,* of counsel, and oral argument by *Mr. Bowers* and *Mr. Hyzer.* They argued, among other things: (1) This action stands only on the language of sec. 1214, defendant not being punishable unless the case comes within that section. And the section must be construed strictly, both because it is part of a tax law and because it is highly penal. *State v. Pullman's P. C. Co.* 64 Wis. 89, 101–104; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 140; *Dean v. Charlton,* 27 Wis. 522; *Dean v. Borchsenius,* 30 Wis. 236, 244; 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §§ 522–527; *State v. Huck,* 29 Wis. 202; *Rietz v. Foeste,* 30 Wis. 693; *Crumbly v. Bardon,* 70 Wis. 385; *Coleman v. Hart,* 37 Wis. 180. (2) The just and true construction of sec. 1214 is that, when the proper officers of the state approve a railroad report of earnings (either as made or as modified to meet the requirements of those officers), and a license is issued by the state treasurer to the railroad, no penalty is incurred by the railroad unless it

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fails to pay the amount of fee which the approved report and the license call for. Any statute must be interpreted, if it can be, so as to avoid unreasonable or unjust consequences. *Hartford v. Northern P. R. Co.* 91 Wis. 374, 377; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 659. How unreasonable and unjust sec. 1214 is if it means what is claimed by plaintiff's attorneys: that defendant is liable under it to $10,000 fine and to forfeiture of its charter if it paid one dollar too little for its license of 1903, though it made a report of earnings, and that report was made honestly and without purpose to defraud the state, and though that report was approved by the officers authorized by the state to pass upon its correctness and sufficiency, and though those officers issued a license to defendant on the basis of the approved report, and though defendant paid the full amount demanded by those officers and named by them in the license as due the state! For a few judicial illustrations of troublesome and uncertain questions arising under a gross-earnings tax law, see *State ex rel. C., M. & St. P. R. Co. v. McFetridge,* 56 Wis. 256; *State v. Pullman's P. C. Co.* 64 Wis. 89; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130; *State v. St. P., M. & M. R. Co.* 30 Minn. 311; *People ex rel. N. Y. C. & H. R. R. Co. v. Morgan,* 168 N. Y. 1, 60 N. E. 1041. Sec. 4, ch. 308, Laws of 1899, amending sec. 1212, Stats. 1898, gives the railroad commissioner power to grant or refuse his approval of the statement made by a railroad company, and so constitutes him a special tribunal to determine, on behalf of the state, the sufficiency of the reported earnings. He really acts like an ordinary assessor; the only difference being that the railroad commissioner assesses (*i. e.* determines the amount of) earnings of property, while the ordinary assessor determines value of property. Similar discretionary, or *quasi*-judicial, power is given, not only to assessors generally, but to the most various official bodies; and their decisions, within their jurisdiction (*i. e.* when on a

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question belonging to them, and not wrong in law, and not unreasonably inattentive to the evidence in the same way and degree as requires a court to set aside the verdict of a jury), are final and binding even upon the courts. *State ex rel. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566, 567; *State ex rel. Cook v. Houser,* 122 Wis. 534, 560, 561; *State ex rel. Coffey v. Oconomowoc,* 104 Wis. 622, 629; *Madden v. Kinney,* 116 Wis. 561, 569; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672; *State ex rel. Moreland v. Whitford,* 54 Wis. 150, 153. The following cases involved decisions by boards of review concerning assessments for taxation: *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 64, 65; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 562; *State ex rel. Smith v. Gaylord,* 76 Wis. 306, 310. The same doctrine, of the finality of decisions, within their jurisdiction, by special tribunals created by statute for the purpose of such decision, has wide illustration in decisions elsewhere. *U. S. v. Arredondo,* 6 Pet. 691, 729; *Baldwin v. Stark,* 107 U. S. 463; *Lee v. Johnson,* 116 U. S. 48; *Wright v. Roseberry,* 121 U. S. 488, 509; *U. S. v. Cal. & Oreg. L. Co.* 148 U. S. 31, 43, 44; *Barden v. Northern P. R. Co.* 154 U. S. 288, 327; *Catholic Bishop v. Gibbon,* 158 U. S. 155, 166; 2 Freeman, Judgments (4th ed.) § 531; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421, 434, 435. (3) If sec. 1214 imposes the penalty in case the fee paid by a railroad to the state is too small—though it is what the railroad commissioner and the state treasurer, in passing on the railroad report and issuing the license, pronounce correct and sufficient,—it is only when the railroad makes a dishonest report, in a purpose to cheat the state. In other words, sec. 1214 imposes the penalty for fraud in the railroad's report, not for honest mistake. *Cohn v. Neeves,* 40 Wis. 393; *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167; *Schumacher v. Falter,* 113 Wis. 563; *Johnson v. Huber,* 117 Wis. 58; Maxwell, Interp. Stat. 77; *Reg. v. Tolson,* L. R. 23 Q. B. D.

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168; *Wallace v. Finch,* 24 Mich. 255; *Batchelder v. Kelly,* 10 N. H. 436; *State v. Luther,* 8 R. I. 151; *Palmer v. State,* 45 Ind. 388; *Hopton v. Thirwall,* 9 L. T. Rep. N. S. 327; *Hearne v. Garton,* 2 E. & E. 66; *Core v. James,* L. R. 7 Q. B. D. 135; *State v. Botkin,* 71 Iowa, 87; *Russell v. Irby,* 13 Ala. 131; *Ex parte Ah Hoy,* 23 Oreg. 89; *McDonald v. Montana W. Co.* 14 Mont. 88; *Bradley v. People,* 8 Colo. 599.

For the appellant *Chicago, St. Paul, Minneapolis & Omaha Railway Company* the cause was submitted on the brief of *Solon L. Perrin,* attorney, and *Thomas Wilson,* of counsel. They argued, among other things: (1) The language of the statute is irreconcilable with the contention of counsel for the state, that the failure of the defendant—by mistake either of law or fact—to include in its "statement" or to pay taxes on every item finally determined to be "gross earnings" within the meaning of the statute, subjects it to such penalties. The language, "if the railroad company shall neglect," etc., is significant. As to the meaning of the word "neglect," see *New York G. & Ind. Co. v. Gleason,* 53 How. Pr. 122, 124; *Woodhouse v. Jenkins,* 9 Bing. 431, 441, 442; *Johnson v. Huntington,* 13 Conn. 47, 50; *White v. State,* 123 Ala. 577, 26 South. 343, 346; *Merrifield v. Cobleigh,* 4 Cush. 178, 184, 185. The mere fact that under the construction contended for by the state a railroad company is subject to a forfeiture of $10,000 and of all its rights, privileges, and franchises for an omission against which no ordinary intelligence or human foresight could guard it, is a conclusive argument against such construction. *Greene v. Greene,* 2 Gray, 361, 364; *Merrifield v. Cobleigh,* 4 Cush. 178, 184, 185; *Crane v. Hyde Park,* 135 Mass. 147, 149; *Manhattan T. Co. v. Davis,* 23 Mont. 273, 58 Pac. 718, 720; *Hooper v. Wells, Fargo & Co.* 27 Cal. 11, 85 Am. Dec. 211, 222; *Duryee v. New York,* 96 N. Y. 477, 495, 496; *Russell v. Allerton,* 108 N. Y. 288, 292; *Lawe v. Hyde,* 39 Wis. 345, 360; *Jacobs v. Spalding,* 71 Wis. 177, 190. Whether cer-

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tain items are or are not properly "gross earnings" cannot certainly be determined by any one until the court of last resort has finally spoken. See *State ex rel. Abbot v. McFetridge,* 64 Wis. 130; *State v. St. P., M. & M. R. Co.* 30 Minn. 311; *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192; *Hanley v. Kansas City S. R. Co.* 187 U. S. 617. The railroad commissioner having been authorized to and required to examine and approve or disapprove the "statement" of gross earnings (sec. 4, ch. 308, Laws of 1899), his approval is conclusive of its correctness, in the absence of any fraud or mistake. *Wilcox v. McConnell,* 13 Pet. 498, 511; *Marquez v. Frisbie,* 101 U. S. 473, 476; *U. S. v. Cal. & Oreg. L. Co.* 148 U. S. 31, 43, 44; *Lamont v. Stimson,* 3 Wis. 545, 553; *Johnson v. Towsley,* 13 Wall. 72, 83, 84; *Quinby v. Conlan,* 104 U. S. 420, 425, 426; *Smelting Co. v. Kemp,* 104 U. S. 636, 645; *Wiseman v. Eastman,* 21 Wash. 163, 57 Pac. 398; *Baldwin v. Stark,* 107 U. S. 463, 465; *Barden v. Northern P. R. Co.* 154 U. S. 288, 327; *Hill v. McCord,* 195 U. S. 395, 400; *Catholic Bishop v. Gibbon,* 158 U. S. 155, 166. The rule of these cases is equally applicable to every officer who acts in a judicial or *quasi*-judicial capacity, no matter what the act or who the officer may be. *State ex rel. Cook v. Houser,* 122 Wis. 534; *Stanley v. Albany Sup'rs,* 121 U. S. 535, 550; 2 Freeman, Judgments (4th ed.) § 531; 2 Cooley, Taxation (3d ed.) 1464, 1467; *People ex rel. Myers v. Barnes,* 114 N. Y. 317, 323–325; 23 Am. & Eng. Ency. of Law (2d ed.) 375–377; note to *Flournoy v. Jeffersonville,* 17 Ind. 169, in 79 Am. Dec. 468, 472–476; *Weaver v. Devendorf,* 3 Denio, 117; *Stewart v. Case,* 53 Minn. 62; *People ex rel. Ulster Co. v. Kingston,* 101 N. Y. 82, 94; *Empey v. Plugert,* 64 Wis. 603, 612; *People v. Bartels,* 138 Ill. 322, 27 N. E. 1091, 1092.

John B. Sanborn and *Alfred H. Bright,* for the appellant *Minneapolis, St. Paul & Sault Sainte Marie Railway Company,* argued, among other things: I. The statutes provid-

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ing for the gross-earnings tax on railways, called a license fee, also provide a way for ascertaining and determining the amount of the tax before the tax receipt, called a license, is issued. The penalty for the nonpayment of the tax or license fee has reference to an amount previously ascertained and determined according to law and which is known to the treasurer as the "fee," one half of which must be paid as a condition precedent to his issuing the license. Assuming that the legislature has not provided any other method or means for ascertaining the amount of the license fee or tax, see, as to the force and effect of the return made in this case, which was accepted by the treasurer and on which he issued the license, *Matheson v. Mazomanie,* 20 Wis. 191; *White v. Appleton,* 22 Wis. 639; *Phillips v. Stevens Point,* 25 Wis. 594; *Lawrence v. Janesville,* 46 Wis. 364. But, in view of the duty and power conferred upon the railroad commissioner by the act of 1899, he is essentially a board of review having the full power and authority to determine the amount of the assessment, and, being such, his decision in that behalf was clearly judicial. *Steele v. Dunham,* 26 Wis. 393, 396. We have, therefore, not only the sworn statement of the railroad company, which prior to 1899 was, within the principle of the cases cited *supra,* conclusive, but we have in addition to that the judicial approval of such return by the officer clothed with ample jurisdiction and power to ascertain and fix the amount as a board of review. And in the cases at bar we have the record showing that all this was done and that the licenses were issued as required by law and that the tax levied by the statute was fully paid. And to say in view of such conditions that any penalties or forfeitures attach under sec. 1214, is certainly to travel outside the principles of law settled by this court and to clearly go beyond the statutes. II. Statutes providing forfeitures for nonpayment of taxes are construed strictly against the state. *Partington v. Att'y Gen.* L. R. 4 H. L. 100, 122; *U. S. v. Wigglesworth,* 2 Story,

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369, Fed. Cas. No. 16,690; *Millett v. Mullen,* 95 Me. 400, 49 Atl. 871; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 140. Statutes imposing penalties for an act or omission are generally construed as making such imposition only when the action is in bad faith. Such has been the holding in various classes of cases. (1) Where statute imposed a penalty for the making of a false return for taxation. *Ratterman v. Ingalls,* 48 Ohio St. 468, 28 N. E. 168; *Ohio Farmers' Ins. Co. v. Hard,* 59 Ohio St. 248, 52 N. E. 635; *Kloss v. Comm.* 103 Va. 864, 49 S. E. 655; *Harris v. Comm.* 81 Va. 240, 59 Am. Rep. 666; *The Ben R.* 134 Fed. 784. (2) Where statute imposed a penalty for failure to satisfy judgment or mortgage. *Schumacher v. Falter,* 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber,* 117 Wis. 58. (3) Statutes imposing penalty for trespass. *Cohn v. Neeves,* 40 Wis. 393; *U. S. v. St. Anthony R. Co.* 192 U. S. 524, 24 Sup. Ct. 333; *U. S. v. Homestake M. Co.* 117 Fed. 481, 54 C. C. A. 303. (4) Statutes imposing penalty for false returns by corporation. *Pier v. Hanmore,* 86 N. Y. 95; *Bonnell v. Griswold,* 89 N. Y. 122; *Felker v. Standard Y. Co.* 150 Mass. 264, 22 N. E. 896. (5) Miscellaneous statutes imposing penalties. *Core v. James,* L. R. 7 Q. B. D. 135; *Hearne v. Garton,* 2 E. & E. 66. III. The defendant acted in good faith in making its return of gross earnings. Where a person acts under advice of counsel, such action is *prima facie* in good faith. *U. S. v. Homestake M. Co.* 117 Fed. 481, 54 C. C. A. 303; *U. S. v. St. Anthony R. Co.* 192 U. S. 524, 24 Sup. Ct. 333; *Boyd v. Royal Ins. Co.* 111 N. C. 372, 16 S. E. 389; *Smith v. Sherman,* 113 Iowa, 601, 85 N. W. 747; *Schumacher v. Falter,* 113 Wis. 563; *Selden v. Cashman,* 20 Cal. 56, 81 Am. Dec. 93; *Myer v. Hart,* 40 Mich. 517; *U. S. v. Ninety-nine Diamonds,* 139 Fed. 961. Sec. 1211 requires every railroad company to make to the state treasurer each year a "true statement" of its gross earnings. While the penalty imposed by sec. 1214 is not in terms for failure to make such

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true statement, yet the meaning of the word "true" in sec. 1211 would be persuasive as to the construction of the penalty section; for if the company does render a true statement, the inference would be that no penalty would be imposed. See *Moulor v. American L. Ins. Co.* 111 U. S. 335, 4 Sup. Ct. 466; *Globe Mut. L. Ins. Asso. v. Wagner,* 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169; *Cochran v. U. S.* 157 U. S. 286, 15 Sup. Ct. 628; *Agnew v. U. S.* 165 U. S. 36, 17 Sup. Ct. 235; *Dorsey v. U. S.* 101 Fed. 746, 41 C. C. A. 652; *Ratterman v. Ingalls,* 48 Ohio St. 468, 28 N. E. 168; *Ohio Farmers' Ins. Co. v. Hard,* 59 Ohio St. 248, 52 N. E. 635; *Putnam v. Osgood,* 51 N. H. 192; *Hatcher v. Dunn,* 102 Iowa, 411, 71 N. W. 343, 36 L. R. A. 689.

For the appellant *Chicago, Milwaukee & St. Paul Railway Company* there was a brief by *C. H. Van Alstine,* attorney, and *Burton Hanson,* of counsel, and oral argument by *Mr. Van Alstine.* They argued, among other things: (1) Both because secs. 1211–1214 are tax laws and because they impose forfeitures—$10,000 and the life of the corporation—they must be construed strictly, and if any proposition asserted under them is doubtful such doubt should be resolved in appellant's favor. *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 140; Potter's Dwarris, Stat. 256; *Rietz v. Foeste,* 30 Wis. 693; *Crumbly v. Bardon,* 70 Wis. 385; *People ex rel. Mut. T. Co. v. Miller,* 177 N. Y. 51, 57; *U. S. v. Wiltberger,* 5 Wheat. 76, 95; *Bolles v. Outing Co.* 175 U. S. 262. (2) The proper construction due sec. 1214 is that when the proper officers of the state receive and approve the statement of gross earnings, and a license is issued to the railway company, the forfeitures prescribed by that section are not incurred unless the railway company neglects to pay the fee which the approved report and the license itself call for. The railroad commissioner is the sole tribunal under the statutes to determine the correctness of a railroad's

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report of gross earnings precedent to the licensing of such railroad to operate its lines within the state during the calendar year, and the approval by that officer of the railroad's report, followed by the issuance of the license thereon and the timely payment of the fee named therein, is a complete protection against the forfeitures prescribed in sec. 1214. *State ex rel. Coffey v. Chittenden,* 112 Wis. 569; *State ex rel. Cook v. Houser,* 122 Wis. 534; *State ex rel. Martin v. Doyle,* 38 Wis. 92; *U. S. v. Ju Toy,* 198 U. S. 253. It is not essential to the finality or conclusiveness of the decisions of special tribunals that the statute creating them should so declare in order to have that effect. *State ex rel. Cook v. Houser,* 122 Wis. 534, 570; *U. S. v. Doherty,* 27 Fed. 730, 732; *U. S. v. Arredondo,* 6 Pet. 691, 729; *U. S. v. Cal. & Oreg. L. Co.* 148 U. S. 31, 43; *Smelting Co. v. Kemp,* 104 U. S. 636, 645; *Baldwin v. Stark,* 107 U. S. 463, 465; *Steel v. Smelting Co.* 106 U. S. 447; *Shepley v. Cowan,* 91 U. S. 330; *Moore v. Robbins,* 96 U. S. 530; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421, 434, 435; *Wright v. Roseberry,* 121 U. S. 488; *Lee v. Johnson,* 116 U. S. 48, 51. The proposition that a railway company forfeits its corporate life and $10,000 by making a return of gross earnings which its officers, under advice of counsel, believed to be true, but is afterwards found to be untrue because of the mistake of counsel, is monstrous. Such is not the rule in this court. *Johnson v. Huber,* 117 Wis. 58; *Schumacher v. Falter,* 113 Wis. 563; *Cohn v. Neeves,* 40 Wis. 393. One who acts honestly under the advice of counsel acts in good faith. *Schumacher v. Falter,* 113 Wis. 563, 567; *U. S. v. Homestake M. Co.* 54 C. C. A. 303; *Myer v. Hart,* 40 Mich. 517, 524. (3) Secs. 1211–1214 apply to earnings derived from domestic commerce only: construed otherwise, they violate the commerce clause of the federal constitution. Several states have adopted the system of taxing railways and other carriers engaged in both state and interstate commerce by requiring

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the payment of a per centum of their earnings derived from such commerce, and the federal supreme court in several decisions has sustained this method of taxation; but in each one of these cases the payment of the per centum of such earnings was not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. *Postal Tel. C. Co. v. Adams,* 155 U. S. 688, 695, 696; *Allen v. Pullman's P. C. Co.* 191 U. S. 171, and cases there cited; *Osborne v. Florida,* 164 U. S. 650, 655; *N. Y., L. E. & W. R. Co. v. Pennsylvania,* 158 U. S. 431, 438; *Western U. Tel. Co. v. Massachusetts,* 125 U. S. 530, 554; *Maine v. Grand Trunk R. Co.* 142 U. S. 217; *McHenry v. Alford,* 168 U. S. 651; *Wis. & M. R. Co. v. Powers,* 191 U. S. 379. That court has repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate business, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman S. C. Co.* 117 U. S. 34; *Robbins v. Shelby Co. Tax. Dist.* 120 U. S. 489; *Leloup v. Port of Mobile,* 127 U. S. 640; *Asher v. Texas,* 128 U. S. 129; *Stoutenburgh v. Hennick,* 129 U. S. 141; *McCall v. California,* 136 U. S. 104; *Norfolk & W. R. Co. v. Pennsylvania,* 136 U. S. 114; *Crutcher v. Kentucky,* 141 U. S. 47; *Postal Tel. C. Co. v. Adams,* 155 U. S. 688; *N. Y., L. E. & W. R. Co. v. Pennsylvania,* 158 U. S. 431; *Osborne v. Florida,* 164 U. S. 650; *Allen v. Pullman's P. C. Co.* 191 U. S. 171.

The *Attorney General,* attorney for the State, and *H. W. Chynoweth,* of counsel, for the respondent, argued, among other things, that the object of the statute in question was to raise revenues for the support of the government and to insure the prompt payment thereof into the state treasury. The penalty was prescribed to enforce the payment of the entire amount which the statute named. This intent is so plain that there is no room for construction in the sense in which the

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term is used by counsel for appellants. Proof of failure to comply with the statute is conclusive, and to evade liability therefor it is necessary to abrogate the statute. The doctrine that a penal statute should be strictly construed against the state has its limitations. The obvious intent of the legislature is not to be defeated. *State v. Shove,* 96 Wis. 1, 9; *Manitowoc Co. v. Truman,* 91 Wis. 1; *Nelson v. State,* 111 Wis. 394, 398; 13 Am. & Eng. Ency. of Law (2d ed.) 57; *In re Coy,* 31 Fed. 794, 800; *State ex rel. Barton v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. 722; *Ellis v. Whitlock,* 10 Mo. 781; *Fairbanks v. Antrim,* 2 N. H. 105. The statute required, first, a true statement of the gross earnings; second, the payment of four per cent. of its gross earnings. There is nothing in either the words or the spirit of the statute which diminishes the amount to be paid on account of an inaccurate or untrue report, or that indicates a legislative intent to permit the report to stand for the fact. On the contrary, the terms used very carefully exclude such an interpretation, and fix the amount to be paid without reference to any statement thereof made by the company itself or by any other person whomsoever. It would require the most explicit and positive expression on the part of the legislature to make conclusive on the courts a statement of this character. It would appear from the language here used that an untrue statement made by a railroad company of its gross earnings was not intended to be conclusive. *San Francisco & N. P. R. Co. v. State Board,* 60 Cal. 12; *Chicago, B. & Q. R. Co. v. Paddock,* 75 Ill. 616; *St. Louis, V. & T. H. R. Co. v. Surrell,* 88 Ill. 535; *Lake Shore & M. S. R. Co. v. People,* 46 Mich. 193; *Ill. & St. L. R. & C. Co. v. Stookey,* 122 Ill. 358; *Comm. v. Fall Brook R. Co.* 188 Pa. St. 199. It is not necessary that the omission or neglect be wilful or fraudulent. *State v. Hartfiel,* 24 Wis. 60; 3 Greenl. Ev. § 21; *Barnes v. State,* 19 Conn. 398; *Comm. v. Mash,* 7 Met. 472; *Comm. v. Boynton,* 2 Allen, 160; *Comm. v. Farren,* 9 Allen,

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489; *Comm. v. Waite,* 11 Allen, 264; *Comm. v. Raymond,* 97 Mass. 567; *Comm. v. Elwell,* 2 Met. 190; *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696; *State v. Alta S. M. Co.* 24 Nev. 230, 51 Pac. 982; *State v. Carson City Sav. Bank,* 17 Nev. 146, 30 Pac. 703; *The Brig Ann,* 1 Gall. 62. Advice of counsel is available only in cases where all the facts have been fully and fairly stated and the advice given on such statement. There is a significant absence of any statement in the record to the effect that counsel either were given or understood what the facts were. This omission is fatal to appellants' case, so far as it is predicated upon advice of counsel. *Messman v. Ihlenfeldt,* 89 Wis. 585; *Sherburne v. Rodman,* 51 Wis. 474; *Sutton v. McConnell,* 46 Wis. 269; *Plath v. Braunsdorff,* 40 Wis. 107. It cannot be contended that the officers of the appellants who made the report were ignorant of the facts. They are conclusively presumed to know what the facts are. *U. S. v. Allis,* 73 Fed. 165, affirmed *Allis v. U. S.* 155 U. S. 117; *Finn v. Brown,* 142 U. S. 56; *Hubbard v. Ware,* 79 Iowa, 678; *Tate v. Bates,* 118 N. C. 287. The state is not estopped by the approval of the railroad commissioner. *Travelers' Ins. Co. v. Fricke,* 94 Wis. 258, 99 Wis. 367; *State ex rel. Fidelity & C. Co. v. Fricke,* 102 Wis. 107, 114; *Sturges v. Carter,* 5 Sup. Ct. 1014; *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 425; *Lake Shore & M. S. R. Co. v. People,* 46 Mich. 193, 9 N. W. 249; *Comm. v. Fall Brook R. Co.* 188 Pa. St. 199; *Reynolds v. Bowen,* 138 Ind. 434; *U. S. v. Bank,* 15 Pet. 377, 401; *Harmon v. U. S.* 43 Fed. 560, affirmed *U. S. v. Harmon,* 147 U. S. 268; *Wis. Cent. R. Co. v. U. S.* 164 U. S. 190; *Hunter v. U. S.* 5 Pet. 173; *Steele v. U. S.* 113 U. S. 128; *U. S. v. Burchard,* 125 U. S. 176; *U. S. v. Stahl,* 151 U. S. 366; *Mullan v. U. S.* 118 U. S. 271; *Wis. Cent. R. Co. v. Forsythe,* 159 U. S. 46; *Southern C. & F. Co. v. State,* 133 Ala. 624; *State v. Raymond,* 12 Mont. 226; *Munsell v. Temple,* 8 Ill. 93; *State ex rel. Lott v. Brewer,* 64

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Ala. 287; *U. S. v. Utz,* 80 Fed. 848; *Gordon v. U. S.* 1 Ct. of Cl. 1; *Board of Comm'rs v. State,* 103 Ind. 497; *Board of Comm'rs v. Heaston,* 144 Ind. 583; *Comm'rs v. Keller,* 6 Kan. 510. The terms of the statute embrace interstate as well as state commerce. The determination of this court as to the proper construction of the statute is conclusive upon the courts of the nation. *Osborne v. Florida,* 17 Sup. Ct. 214; *Noble v. Mitchell,* 164 U. S. 367, 372, and cases there cited; *Leffingwell v. Warren,* 2 Black, 599; *People v. Weaver,* 100 U. S. 539. As to the words of the statute themselves, they are not open to construction. They are not susceptible of a double or doubtful meaning or interpretation. But as to their applicability to the different kinds of commerce they are, as used, doubtful, ambiguous, and open to construction. They have been construed by the officers of the state, by the appellants, and by all other similar corporations called upon to comply with the statute or intrusted with any power or duty with reference to it for each year since 1876. This practical construction was recognized by this court in *State v. Pullman's P. C. Co.* 64 Wis. 89, 99; it stands approved by the court itself, and is therefore binding.. *Scanlan v. Childs,* 33 Wis. 663; *State ex rel. Hudd v. Timme,* 54 Wis. 318; *Dean v. Borchsenius,* 30 Wis. 236; *Eau Claire Nat. Bank v. Benson,* 106 Wis. 624; *State ex rel. Heiden v. Ryan,* 99 Wis. 123; *Michels v. State,* 115 Wis. 43; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90; Sutherland, Stat. Constr. § 311, and cases cited in note 2, § 307, and numerous cases cited in note 3. Thus construed to embrace interstate commerce the statute does not contravene the federal constitution. It does not impose a specific tax upon the gross earnings of the companies. It does not prohibit the transaction of interstate commerce by any railroad company within or without the limits of the state. It simply imposes a tax upon the physical property of companies situated within the state and their franchises granted by or used in the state; and it

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measures this tax by a resort to the gross earnings. If there be power in the legislature of the state to tax the property of a corporation which has a situs in the state, and to tax its franchise granted by the legislature of, or exercised in, the state, then this law is good. The mere fact that the sum to be paid may have been called by the legislature a license fee is wholly immaterial: its name does not make it anything different from what it actually is. It has always been considered a tax upon the property of the company, measured by the gross earnings. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37. There is nothing in the words of the statute which warrants the statement that the legislature imposed the tax as a condition upon the companies to do even a local or state business, much less to do an interstate business. The property of corporations and persons engaged in the business of interstate commerce is subject to taxation within the state where it is located, to the same extent and under similar circumstances as other property. *Delaware Railroad Tax,* 18 Wall. 206; *State Tax on Railway Gross Receipts,* 15 Wall. 284; *Atlantic & P. Tel. Co. v. Philadelphia,* 190 U. S. 160; *Maine v. Grand Trunk R. Co.* 142 U. S. 217. This last case has been approved in the following federal cases: *Hanley v. Kansas City S. R. Co.* 187 U. S. 617, 621; *Wis. & Mich. R. Co. v. Powers,* 191 U. S. 379, 383; *Postal Tel. C. Co. v. Adams,* 155 U. S. 688, 699; *Ashland v. Ryan,* 153 U. S. 436, 446; *Hooper v. California,* 155 U. S. 648, 652; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421, 431; *New York, L. E. & W. R. Co. v. Pennsylvania,* 158 U. S. 431, 440; *McHenry v. Alford,* 168 U. S. 651, 670; *Western U. Tel. Co. v. Taggart,* 163 U. S. 1, 21; *Western U. Tel. Co. v. Henderson,* 68 Fed. 588, 600. And also in the following state cases: *Cumberland & Pa. R. Co. v. State,* 92 Md. 668, 688; *Comm'r of Railroads v. Wabash R. Co.* 126 Mich. 113, 115; *People ex rel. Pennsylvania R. Co. v. Wemple,* 138 N. Y. 1, 13; *Union R. T. Co. v. Lynch,* 18

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Utah, 378, 394, 55 Pac. 643; *Lumberville D. B. Co. v. State Board,* 55 N. J. Law, 529, 535. And see 27 Am. & Eng. Ency. of Law (2d ed.) 932; 1 Cooley, Taxation (3d ed.) 160, 162.

The following opinion was filed June 21, 1906:

MARSHALL, J. The question is sharply presented in these cases as to whether the absolute forfeiture of $10,000 under sec. 1214, Stats. 1898, applies to a mere mistake of law or fact or both, in respect to the scope of the term "gross earnings," or any other mere mistake on the part of any railway company, in respect to disclosing, as the law contemplates, the full amount of such earnings, such mistake not attributable to bad faith or inexcusable negligence, from the standpoint of business conduct generally,—and consequent failure to pay the amount due the state on account of such earnings, without intentional wrong. The learned circuit court decided in the affirmative.

We have not been able to reach a satisfactory conclusion in these cases without taking a broader view of the subject involved than was presented in the briefs of counsel or argued orally. Such broader view seems necessarily to extend to and include matters which may or will be involved in probable, prospective independent litigation. Nevertheless, such matters have seemed to be so closely connected with the present controversy, as regards the meaning of the legislative enactment involved, as to really form a part of the subject matter in hand, and, in justice to the parties, to require consideration thereof.

Further to illustrate the prime necessity, in the interest of justice, for the wide range our considerations here must necessarily take and the propriety thereof the following may be said:

In the narrow view of the subject in hand only a partial construction of the various features of the legislation for tax-

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ing railway property by the indirect method, a view that would omit considering whether the state may pursue the defendants, efficiently, as to the amounts which they confessedly ought to have paid but did not pay, one result might be the only one that could be reached. In the broader view, necessarily including such capacity to pursue, an opposite conclusion might be the only one that could be reasonably reached. The relations between the state and railroad companies under the license taxing law, the precise nature of the obligations of the latter to the former in respect to the taxes, so called, the question of whether those elements differ from those in respect to an ordinary tax, and, if so, to what extent, and with what result, in one view of the matter might or would, as we shall see, incline the scales of justice one way or the other according as they might be determined.

Obviously, in deciding a question, the court ought to carefully guard against going outside of the particular matter in hand. All questions so far collateral as not necessarily to be included in such matters should be omitted in stating reasons for the final result. Especially when what is said, as here, may relate to questions liable to be vital in controversies which are of themselves appropriate subjects of litigation, and apparently liable in due course to reach the court for consideration, the importance of guarding against expressing opinions in respect thereto calls for the highest degree of care to avoid it. However, like all good rules, that has its exceptions. Necessity creates exceptions to many rules, extending their otherwise quite arbitrary boundaries. Here, only in the light of the true nature of the obligations of railroad companies to the state under the scheme for raising revenue in question, and all remedies of the state which the legislature may reasonably be said to have had in contemplation in adopting such scheme: only in the light of the legislative plan as a whole, can clear warrant be discovered for reading out of the law a condition of the penal liability under sec. 1214, not there

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found expressly stated. The language of the act is about as plain in its literal sense, as will be seen, as words expressing an idea could well be. In such sense default of a party, whether wilful or innocent, excusable or inexcusable, from a moral standpoint, lays such party liable, absolutely, for the full penalty mentioned in the statute, and liable in the discretion of the court to further punishment. That seems exceedingly harsh, but if the legislature intended to be that harsh and did not exceed constitutional limitations in that regard, the court has no right to invade its domain by judicially, so to speak, amending the law.

We fully appreciate as indicated that a decision should not, without some good warrant therefor, be broadened out beyond its necessary scope. When the question at issue is important, and is closely connected with somewhat collateral matters, which might, by themselves, constitute an independent matter for decision, and a conclusion in respect thereto would throw much, though not necessary, light upon the right of the particular controversy, and either by its aid a just conclusion would be attainable, when otherwise the result might be different, or the same result might be reached without such solution, though not so satisfactorily *in præsenti,* or with so much certainty of such result being permanent by the rule of *stare decisis,* as through the aid of such solution, the broader view is not only permissible but is often advisable, except in case of known independent pending or impending litigation liable to be affected incidentally thereby. However, when the right of the controversy in hand cannot in any way be vindicated without judicial treatment covering a broad field, including some question or questions liable to be vital to other pending or prospective litigation, justice should not be denied in the former, nor even be jeopardized, either because not attainable at all, or clearly and decisively attainable, without considering and deciding such other question or questions. That does not lead to any unnecessary prejudicial anticipa-

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tion of matters which may or probably will come up later. It merely involves an unavoidable solution, for the purposes of one case, of questions upon which another may or probably will turn.

Fully convinced of the soundness of the views stated, and fully appreciating that the broad scope we shall give to the matter in hand may involve an expression of opinion upon matters vital to controversies yet probable to come before us, but fully believing that it is unavoidable under the circumstances, we proceed, convinced that what has been said sufficiently shows that, so far as our conclusion may incidentally indicate a leaning as to such other controversies, the happening will be clearly seen to be what it in fact is, an occurrence *ex necessitate rei.*

Eliminating from the law those portions not necessary to its meaning, as to the subject here, and indicating by a parenthesis the amendment of 1899, the entire legislative scheme appears thus:

Sec. 1211. "Every railroad company . . . shall on or before the 10th day of February in each year make return to the state treasurer" in the manner required by him "a true statement of the gross earnings of" its road "for the preceding calendar year . . . verified by the oath of its secretary and treasurer."

Sec. 1212. "Each such railroad company . . . shall, on returning such statement, apply for a license *to operate the railroad mentioned in such statement,* and shall pay the license fee therefor provided in the next section; and thereupon (if such statement be approved by the railroad commissioner) shall receive from the state treasurer a *license . . . for the calendar year* commencing on the first day of January preceding, . . . unless sooner revoked."

Sec. 1213 specifies the fee as to each road, according to a stated classification, "one half of the license fee" to "be paid at the time the license issues, and one half on or before the 10th day of August in each year."

Sec. 1214. "If any such railroad company . . . shall neglect to obtain such license or pay the license fee therefor or

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any part thereof" it "shall *absolutely forfeit* to the state the sum of ten thousand dollars, . . . and such neglect shall also be a cause of forfeiture of all the rights" granted under the laws of this state. The attorney general "shall collect by action the pecuniary forfeiture herein imposed and also proceed to have forfeiture," otherwise, "duly declared. Any such company . . . before the final judgment of forfeiture . . . may be permitted to make the return and pay the license fee herein provided for upon special application to the court . . . upon such terms as the court shall direct."

These actions, as counsel for appellants contend, are governed by sec. 1214, but, as before indicated, the meaning thereof must be determined by looking at all parts of the plan of which that forms one feature.

The idea is advanced that the words "obtain a license or pay the license fee therefor or any part thereof" refer to invoking favorable action by the administrative officers of the state having to do with the matter: the railroad commissioner, as to passing upon the report, and the treasurer, as to receiving the license fee and issuing the proper license, and that the result is conclusive in favor of the licensee, as to the penal clauses. Counsel reach that conclusion by assuming that the law which first included the license feature (ch. 174, Laws of 1860) provided for a return, as now, payment of the required percentage on "gross earnings . . . to be ascertained *by such return,*" and the issuance of a certificate acknowledging such payment, that to be "evidence of the facts therein contained,"—made the return conclusive of the amount payable, and the license conclusive as to the fact of payment; and that such features, though discontinued by the Revision of 1878, were in effect restored by the change in 1899, requiring, as a condition precedent to the issuance of the license, approval of the report by the railroad commissioner. The assumption does not seem warranted.

The dominant feature of the law of 1860 is contained in sec. 1: the idea that every railroad shall be required to pay

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to the state, as a condition of conducting its business, a stated proportion of its gross earnings. The rest of the act consists of mere administrative features. Such dominant feature was a substantial continuation of the controlling feature in the initial law on the subject (ch. 74, Laws of 1854) incorporated into sec. 183, ch. 18, R. S. 1858. It has been continued down to the present time, and is now contained in secs. 1212 and 1213, Stats. 1898. It still requires, without qualification, payment of a license fee each year *for the privilege "to operate the railroad"* for such year, except as displaced by ch. 315, Laws of 1903.

The license was not, by the act of 1860, made conclusive evidence of payment of the full amount required by law, nor, expressly, evidence at all of compliance therewith, but "evidence of the facts therein contained," referring obviously to the facts *required* to be contained therein: viz., making the return of gross earnings, application for a license thereon, and payment of the required percentage of such earnings, *"as ascertained by such return."* It would be a highly unreasonable construction of such provisions to hold that the legislature intended thereby that the state should take the return as absolutely correct, leaving no remedy for failure of the railroad company, through mistake or fraud, to pay the proper amount. It must have been contemplated that the payment, precedent to the issuance of the license, should be based on the statement of gross earnings made by the payee, and that the license should be evidence thereof, but not more than *prima facie* evidence of payment of the amount required by law.

True, in the Revision of 1878 the former feature, expressly making the certificate of payment evidence, and the express requirement for payment to be made upon gross earnings "as ascertained by such return," were omitted. But we do not find any evidence in the revisers' notes, or in their work as approved by the legislature, indicating a purpose to

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change the existing law. It was not necessary to declare that the license should be "evidence of the facts therein contained," to make it so. It would be such without any such declaration, but not conclusive evidence in any event, unless made so expressly.

By the re-enactment of sec. 2 of the law of 1860 in sec. 1212 of the Revision of 1878, a railroad, on returning its statement, was required, as before, to apply thereon for a license and make the payment required by law, payment manifestly on gross earnings according to such statement. No investigation by the treasurer was required to be made nor contemplated precedent to such payment. The making of the return, payment of the required percentage of gross earnings as indicated therein, and issuance of the license are plainly treated as if they were intended to follow each other without interruption and as a matter of course. That feature did not preclude the treasurer from refusing to issue the license upon the return made, and thereby challenging its correctness, as was done in *State ex rel. C., M. & St. P. R. Co. v. McFetridge,* 56 Wis. 256, 14 N. W. 185; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 24 N. W. 140; and *State ex rel. Bell v. Harshaw,* 76 Wis. 230, 45 N. W. 308. The same was probably true under the law of 1860, notwithstanding the provision requiring payment of the license fee upon gross earnings as "ascertained from such return." From the first, the legislative idea was to create an obligation to the state of each railroad company, in exchange for the privilege of operating its road, to pay the former a specified proportion of the latter's gross earnings, and to impose upon each such company the duty to make a correct showing of the whole, so as to enable the state, through its proper officers, to accurately determine its proportion. That duty was not performed under the act of 1860, nor the subsequent law on the subject, except by performance in fact as well as in form. Hence, in case of the latter, merely, the officer upon whom

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the duty was imposed to issue the license, upon refusal, was not put in default so as to be open to coercion, successfully, by *mandamus*.

The feature of the law added in 1899, making approval of the railroad companies' return, as well as payment of the license fee, a condition precedent to the issuance of the license, is new. It plainly contemplated payment to the state of the specified proportion of gross earnings as ascertained by such return, the same as before, but a withholding of the license till approval of such return should be secured, unless that should occur before making the application. The scope of the commissioner's duties in the matter has an important bearing on the right of these controversies. If the law clothed him with *quasi*-judicial duties in respect to the subject, intending his approval to be in the nature of a judicial determination, as counsel for appellants contend, then, of course, until such determination in any case shall be avoided for jurisdictional error it will form a bar to any prosecution under the penal provisions of the statute. *State ex rel. Cook v. Houser,* 122 Wis. 534, 560, 561, 100 N. W. 964.

Applying the change wrought in 1899 to the subject with which it deals, ambiguity in the language is apparent at once. *"If such statement be approved by the commissioner."* Those words are very comprehensive in their literal sense. That goes so far as to suggest intention for the commissioner to act as a judicial arbitrator between the state and the applicant for a license, respecting whether the amount of gross earnings and the trackage reported by the latter: the two things necessary to determine the proper amount of such applicant's contribution, are correct, in many cases requiring a long, laborious, and searching investigation of the books of the railroad company. That indicates the words were used in a somewhat narrower sense than the full scope thereof, since, as seems plain, the duty of approval was not supposed to require any considerable time in performance. Notwith-

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standing the change, the payment of one half the license fee at the time of issuing the license remained as before.

The amendment, as will be seen, treats the return, the application for the license, and the payment therefor as parts of one transaction. Evidently it was intended the applicant should obtain the requisite approval of its return in advance of presenting it to the treasurer. That is manifest from the fact that, notwithstanding the added feature, the time for making the return and applying for the license was not changed, and the applicant was still required to pay one half of the license fee *at the time of issuing the license.*

"And thereupon," says the amendment, "if such statement shall be approved" a license shall issue. "And thereupon" refers to the making of the return and the payment. It signifies immediately: at once. "If such statement be approved," in view of the context, signifies a condition *in præsenti,* harmonizing with "thereupon" as regards the making of the return, application for the license, and payment of the license fee. The subjunctive form was used with the mere conditional instead of the indicative form. The idea intended is this: upon payment of the license fee required by law according to a statement approved by the railroad commissioner, the license shall issue. Had the language of the amendment been, if such statement is approved, or if such statement shall be approved, suggesting a condition, or if such statement shall have been approved, suggesting a previous act of approving, the real legislative intention would appear more clearly. Hence, while the approval may be a subsequent occurrence, and the issuance of the license be delayed therefor, the legislative idea evidently was that the commissioner should have sufficient opportunity to perform his duty in that regard prior to the time for payment.

An investigation of a year's business of all the railroad companies operating in this state would take the time of the railroad commissioner with a corps of expert assistants for

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months. There can be no reasonable doubt about that. Such an investigation would be necessary, in any case, in order to determine the truth of the report presented by a company, independently of mere general information afforded by the company itself. The time which the commissioner could devote thereto before the date for paying the license fees would be too short, altogether, even for investigating the business of one road. The year to be covered by the report closes December 1st. In forty-two days thereafter, the report is required to be in the hands of the state treasurer, with the commissioner's approval thereon.

There is no more familiar rule for the construction of statutes than that a meaning should not be attributed to one which will render it absurd, if another which is reasonable can be discovered, expressed within the scope of the language used.

"Courts may ignore the literal sense of words even where there is no uncertainty of expression, in order to clear up obscurities and avoid absurd consequences, and carry out the idea of the lawmakers, if such idea . . . can be reasonably said to be covered by the language used." *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544; *Rupiper v. Calloway,* 105 Wis. 4, 6, 80 N. W. 916.

The duty, impliedly imposed on the railroad commissioner, must be one possible for him to perform in order to render the law a sensible enactment. By turning to the statutory requirements as to information to be furnished the commissioner's office by railroad companies, the nature of that duty seems apparent. By sec. 1843, Stats. 1898, every railroad company is required, each year, to make a report to its stockholders of all its operations for the year ending the preceding 31st day of January, and to send a certified copy thereof to the railroad commissioner, on or before the 1st day of February. It will be noted that *ex industria* the legislature required such report to be in the hands of the railroad com-

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missioner in time for use in verifying the statements of the railroad companies under sec. 1211. Such report is required to contain much information of value to the commissioner in performing his duties under sec. 1212.

Further, by sec. 1795 of the Statutes, every railroad company is required to make such reports to the railroad commissioner under oath as he shall require, and particularly to make such reports as may be necessary to enable him to make return to the state treasurer on or before the 10th day of February in each year, as to certain specified matters. Thus, again, it will be noticed that the information required to be furnished to the commissioner's office must be there before the time for him to perform his duty of approval of the statements. So, quite plainly, the legislature must have contemplated the existence in such office of the information requisite for the commissioner's use in verifying the correctness of the statements and performance of mere ministerial duties in respect to the matter. The idea is that, prior to February 10th in each year, the commissioner shall receive the statements purposed to be returned to the state treasurer, and to reasonably verify them so far as shown to be correct by the files of his office. So the law, at the time of the occurrences under consideration, did not require performance by either the state treasurer or the commissioner of any duty in respect to the statement of any railroad company, precedent to the issuance of the license to it under sec. 1212, except one of purely ministerial nature.

What has been said gives due consideration, it is thought, to all matters of importance relied upon by appellants as showing the purpose of the legislature up to 1878, and again commencing with the act of 1899, of making the license a full protection to the holder as to penalties for noncompliance with the law in respect to payment of the required proportion of gross earnings. We will now briefly refer to those features of the law necessary to be dealt with favorably

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to respondent in order to support the judgment. We shall forego treating the matter historically to the full extent. We will content ourselves by briefly stating the condition of things which confronted the revisers in 1878, and the way they met it. That will place before us sharply the origin of some of the difficulties to be solved under the law as we now find it. The law at the time of the occurrences under consideration was the same, in all essential particulars, as it was left by such revision, the act of 1899 not working any material change, as we have indicated.

The situation for the revisers to work into a harmonious system was created by the following:

(1) Ch. 74, Laws of 1854, contained three features: (a) An obligation of every railroad company to file with the state treasurer by January 10th of every year a verified statement of its gross earnings in this state for the previous calendar year; (b) an obligation of each such company by such time to pay into the state treasury, as a tax, one per centum of such earnings, that to be in full of all tax liabilities on account of its property; (c) liability to "forfeit to the treasurer of the state for the use of the state, the sum of $10,000 for each case of neglect, to be recovered in the name of the state treasurer by the action of debt." That law was incorporated into the Revised Statutes of 1858 at secs. 182, 183, and 184, ch. 18, the penal clause being so phrased as to apply only to violations of the provisions of that chapter.

(2) Ch. 140, Laws of 1859, changed the date in the first feature to February 10th, and that in the second to April 1st.

(3) Ch. 174, Laws of 1860, revised the second feature: the one contained in sec. 183 aforesaid, without changing it as to the amount of the exaction, making the date of payment February 10th, adding the license feature and the idea of payment upon gross earnings as ascertained by the statement, substituting for the express idea, formerly, of payment of a part of the earnings as a tax, the idea of payment

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thereof as compensation *for the "privilege of operating the road:"* such matters being incorporated into two sections; and adding in a separate section the features as to failure to comply with the provisions of that act, the duty of the attorney general to prosecute therefor, and the right of the court in the action, in its discretion, to grant relief from the default on terms. It should be noted that by mistake, it seems, the legislature failed to expressly repeal sec. 183, which was fully revised as stated, though it was manifestly repealed by implication. There was a repeal expressed of sec. 133, ch. 18, of the Revised Statutes, which was doubtless intended for sec. 183. It should be further noted that the amendatory act of 1860 did not contain any provision as to a return. That was left to be governed by the existing law.

(4) Ch. 22, Laws of 1862, changed the proportion of gross earnings from one per cent. to three per cent., and permitted one half to be paid upon the issuance of the license and one half August 20th thereafter, failure to pay the second half to work a forfeiture of the license and incur the punishment provided in the act of 1860.

(5) Ch. 315, Laws of 1874, and chs. 97, 113, Laws of 1876, changed the license fees and classified the roads.

Thus it will be seen, the penal provision, particularly involved here, originated in 1854, but after 1860, until the new revision, it did not apply to any default except failure to make the report, while punishment by forfeiture of rights and franchises applied to failure to make the requisite payment and to obtain the license.

The revisers proceeded thus: The first feature of the law of 1854, as incorporated in sec. 182 of the Revision of 1858, as modified by the law of 1859, without change was made sec. 1211.

The second feature of the original law, as incorporated into sec. 183 of the Revision of 1858 and changed by the

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law of 1860,—eliminating the express requirement for computing the percentage of gross earnings on the whole thereof as "ascertained from such return," adding the idea of termination of the license by revocation, found only in the act of 1862, in connection with failure to pay the second half of the license fee: eliminating the feature as to the proportion of gross earnings to be paid, and referring to the next section for that subject, and adding the idea that the license should be revocable for cause,—was made sec. 1212.

The feature last said to have been eliminated with the change as to the proportion of earnings to be paid and classification of roads made by acts of 1874 and 1876, and the feature of the law of 1862 as to the payment of the license fee in two instalments, was made sec. 1213.

The third feature of the act of 1854, as incorporated into sec. 184 of the Revision of 1858: the one particularly involved here, and not applicable, as we have seen, other than to failure to make the return of gross earnings, after the law of 1860, and the penal feature of the later law, which, as we have seen, was therein made applicable to failure to pay the required percentage or procure the license, were combined as sec. 1214, and made applicable to any default as to any of the requirements under the preceding sections, the word "absolutely" being interpolated before the word "forfeit" as regards the $10,000 feature, so that whereas before the wording of the law was "shall forfeit," etc., it was made to read "shall absolutely forfeit," etc.

Thus we have this situation, in express language, as to every railroad company: *first,* a requirement to make an annual report of gross earnings; *second,* a requirement to obtain an annual privilege to operate the road, the same to be evidenced by a license issued by the state treasurer; *third,* an obligation to pay to the state for such privilege a specified proportion of gross earnings, one half at the time of the issuance of the license and one half August 10th thereafter;

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fourth, absolute liability for the payment of $10,000 for any default in respect to any of such matters, and a conditional forfeiture of franchises. No mention is made in the law of the subject of taxation as such. That is an exceedingly important feature of this case. A penal statute in aid of the taxing power only or as a police regulation might not be open to the liberal construction of one in aid of the enforcement of taxes having the element of contract obligation.

It is not important here that the exactions are taxes in the broad sense of the term, which includes all burdens imposed, resulting, in the discharge, in contributions to the public funds for the public use. The term "tax" has come to be applied to all sorts of exactions which swell the public funds, stopping short only of fines imposed as punishment for criminal occurrences. Laws requiring payment to the state of compensation for the enjoyment of a privilege, such as that of a foreign corporation to do business within the state, or requiring contribution to the public treasury as mere police regulation, such as license fees of hawkers or peddlers and saloon license fees, are commonly called taxes. In a broad sense most of them are referable to the taxing power though probably no one would regard them as taxes in a constitutional sense: that is as taxes on property falling under sec. 1, art. VIII.

The payment by a railroad of a percentage of its gross earnings as compensation for the privilege of operating its road, or exemption of its property from the burdens of ordinary taxation, is generally spoken of as a tax, and properly so in the broad general sense, since the sum paid goes into the public funds to meet public expenses, and the method by which it is secured is an indirect way of reaching the railroad property for the purpose of obtaining public revenue therefrom. However, such method involves the contractual element, while taxation in the ordinary sense: taxation on property, which is regulated by sec. 1, art. VIII, of the con-

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stitution, does not involve such element at all. Such taxes do not constitute debts in the ordinary sense. Ordinary remedies for the collection of debts have no application to them unless the statute so provides. The text-writers uniformly say upon authority that an ordinary tax on property does not involve a contract, express or implied. Cooley, Taxation (3d ed.) 17. When we keep in mind the distinction between a privilege tax involving the element of contract, and a direct tax on property, which does not involve such element, we can easily see that though the former are commonly and properly denominated taxes they are not referable to the taxing power in the constitutional sense. This we shall see more fully later.

The act of 1854, as we have shown, in terms required the payment by each railroad company of a percentage upon its gross earnings, the same to *"take the place and be in full of all taxes upon its property."* When it was challenged first in *Milwaukee & M. R. Co. v. Waukesha Co.,* decided in 1855 and not officially reported in due course (9 Wis. 431), its validity turned principally on whether it was an exercise of the taxing power in the strict sense of the term: such power as expressly recognized and limited in the constitution. All members of the court participating in the decision seem to have agreed in the negative, and such was the view of Judge HUBBELL, who decided the case at the circuit.

True, we have only a fragmentary history of that case preserved in the books, but it is about as definite in connection with the emphatic approval thereof in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, as an authoritative statement of the law, as if a formal opinion had been filed showing not only the final result, but the process of reasoning by which it was reached. We will give that history, in brief, with the various allusions to the matter by those who had early to do therewith, demonstrating, it is thought, that the decision was not grounded on the idea that the law of

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1854 provided for a tax on property in the ordinary sense, but was based on the principle of privilege taxes.

Judge HUBBELL's view is most clearly shown by this quotation from his opinion:

"I see no reason why . . . the law in question, which operates as a partial exemption from general taxation, may not be valid. Regarding the annual payment to the state as a tax, as the defendants claim, why might not the legislature grant exemption in all other respects? The law, certainly, is not void, because it is not worse, and does not confer greater privileges . . . to wit, total exemption. But I regard the payment to the state, not as a tax, but as a bonus or compensation for the exemption granted. . . . Had the legislature exempted their property from ordinary taxation, in consideration of their doing some service to the state—such as carrying troops or public stores free of charge,—no one would call the service a tax, or question the validity of the exemption. *It would be a privilege granted for a service rendered.*"

Here at the very outset is the idea of revenue with incidental contract relations as distinguished from revenue derived from ordinary taxation. The meaning is unmistakable, viz.: revenue not from taxes on property in a constitutional sense, but in exchange for a privilege granted.

That idea which, it seems, formed the basis for the first judicial declaration was never departed from. When the matter was presented to this court upon review, the members thereof consisted of Chief Justice WHITON and Justices SMITH and COLE. The first and last were members of the convention that framed the state constitution and must be presumed to have been well equipped, especially the chief justice, who took a leading part in such convention, to meet successfully the responsibility of reaching a correct conclusion as to the nature of that part subsequently so judicially considered. No expression made by the chief justice in the case has been preserved, but it must be taken as a verity that he fully concurred in the decision as framed by Justice

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SMITH, which, though mislaid for a time, was recovered and since 1860, at least, has been part of the official reports. We have the same presumption as to Justice COLE reinforced by his expressions in subsequent cases. In *Knowlton v. Rock Co.* 9 Wis. 410, in his opinion dissenting from the practical overruling, as he thought, of the decision in the former case, he said, speaking thereof:

"This court, after as full an examination and as careful consideration as has been given to any case which I have participated in deciding, sustained the law; the validity of which had been called in question. Though no opinion has been prepared, *yet the points decided were written out by one of the members of the court, and, as he informs me, placed on file with the papers in the case.*" [Note the declaration that the points unanimously agreed upon were those stated in the written memorandum.] "It appears that the paper containing these points has been misplaced, or cannot now be found. Still, I supposed the ground of that decision was well understood throughout the state. This court did not decide, as has been intimated, that the law of 1854 did not impose a tax in the just and proper sense of that term, but was a payment made to the state . . . in the nature of a bonus or compensation for the exemption granted. . . . The legislature might prescribe that all the railroad property in the state should pay one per centum of the gross earnings of their respective roads, in lieu of all taxes, as was done by the act of 1854, and yet this law would be valid."

It will be seen that Justice COLE was then speaking wholly from memory. His declaration that it was not held in the former case that the law of 1854 "did not impose a tax in the just and proper sense" would be misleading if not taken in connection with the memorandum decision which he testified was correct. His affirmation in that regard makes such memorandum in effect his deliberate declaration as to what was in fact formerly decided, re-affirming it after a lapse of some four years. That he did not have a clear remembrance of the precise nature of the decision is evident from the fact

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that he disagreed in respect thereto with his then associates whose idea of it was confirmed by the memorandum when found. Such associates must have been very firmly convinced of the correctness of their view or else they would not have ventured to disagree with Justice COLE as to a matter resting wholly in memory in which he participated but they did not. However, their view became that of the court, as to what was really the dominant feature in the first case, and so it has stood till this day, as will more fully appear in *Chicago & N. W. R. Co. v. State, post,* p. 553, 108 N. W. 557.

In Justice COLE's opinion he used the term "in lieu of all other taxes," instead of the term "in lieu of taxes," used by Judge HUBBELL, suggesting somewhat that the court in the former case treated the exaction as a tax in a constitutional sense, evidently through failure of memory. The difficulty evidently grew out of the fact that two points were presented and decided in the former case, viz.: (1) Assuming that the law contemplates a tax under sec. 1, art. VIII, of the constitution, does the law violate the constitutional requirement of uniformity? (2) Does the law contemplate a tax referable to sec. 1, art. VIII, of the constitution? The negative of the first proposition would support the law. The negative of both would support it. The affirmative of the first and the negative of the second would support it. The second proposition was given primary place by counsel on both sides as the briefs of Mr. Ryan and Mr. Finch clearly show. The brief of Mr. Finch, under a principal and four sub-heads, argued that the law does not impose a tax, continue, or renew a tax, and a license exaction for a privilege is "not a tax within the meaning of the constitution." The several aspects of the case were presented by counsel. They were distinctly covered by the decision, as the record shows. The first aspect is the one that seems to have most lastingly impressed Justice COLE's mind, as is indicated from his language quoted and is also testified to by

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Justice PAINE, *State ex rel. Att'y Gen. v. Winnebago L. & F. R. P. R. Co.* 11 Wis. 35, 38.

All uncertainty was fully cleared up later. The proof that those associated with Justice COLE in *Knowlton v. Rock Co.* 9 Wis. 410, supposed and acted upon the theory that the former decision went mainly upon the ground that the law of 1854 did not contemplate an ordinary tax such as is referred to in the constitution, leaves nothing to be desired. Chief Justice DIXON who wrote the opinion said of the former decision:

"However, from the best information we have been able to obtain, we are relieved from any embarrassment growing out of the doctrines which it was claimed by counsel were established by it; as we learn that it was determined by the court *that no question of the exercise of the taxing power was involved in it.*"

Justice PAINE, who was the other associate of Justice COLE in the *Knowlton Case,* later in *State ex rel. Att'y Gen. v. W. L. & F. R. P. R. Co., supra,* said on the same subject:

"According to the best information we had of it, the court held that the imposition upon the railroad *was not a tax within the meaning of the constitution.*"

Before this later case Justice COLE's memory as to the first case seems to have been somewhat refreshed, as note his language in the second dissenting opinion:

The case presents for consideration "the validity of those provisions of *our revenue law* requiring the several railroad . . . companies to pay annually into the state treasury one per centum of the gross earnings of their respective roads which are declared shall *be in lieu of all taxes that might otherwise have been imposed upon that class or description of property.* . . . If the legislature can exempt railroads from taxation on the ground of public policy or convenience, can it not say they shall pay one per centum of the gross earnings of their respective roads into the state treasury in lieu of all taxes? . . . I have no doubt but it is entirely competent for the legislature to make these various exemptions."

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Thus he concurred, quite distinctly, in effect, with all others whose testimony we have on the subject, that the original judicial idea of the law of 1854 was that it did not provide for taxation of property in a constitutional sense, but did provide for exemption of property therefrom and compensation to the state for the privilege. It obviously, it seems, evinces a confusion of ideas when it is said that compensation in lieu of taxation, in a constitutional sense, is itself taxation in such sense.

We will now look particularly at the written evidence of the decision in *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431; the memorandum under the hand of Justice SMITH, recovered after *Knowlton v. Rock Co.* was decided, and said by Justice COLE, as we have seen, to be a correct statement of the points previously decided. That left no ground, it would seem, to doubt that the proposition of primary importance in the case was the first one we have mentioned, and that it was decided in the negative. This is the language of the memorandum:

"The court do not think the law of 1854 does impose a tax within the meaning of the constitutional provisions, and therefore the law is valid so far at least as the government is concerned."

After many vicissitudes that decision was affirmed in *Kneeland v. Milwaukee,* 15 Wis. 454, decided in 1862. The conclusion there reached effaced from our records everything that had occurred casting discredit upon the first decision, and intrenched and dignified it as voicing the true nature of the law of 1854 and the dominant reason why it was not condemned as unconstitutional, namely: because it did not deal with the subject of taxation in a constitutional sense at all, but dealt with the power to exempt from taxation and to exact an equivalent therefor. Speaking of the effect of the latter decision, in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, the present chief justice said, sub-

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stantially: It put upon all judicial decisions and expressions with reference to the act of 1854 subsequent to the decision in *Milwaukee & M. R. Co. v. Waukesha Co.* in 1855, inconsistent therewith, the impress of "mere *dicta*." The chief justice further well said that considering the ability of counsel who presented the case and the justices who considered and decided it, "it would seem almost impossible that there should be any mistake in the conclusion reached." The conclusion "necessarily was adverse to every point" raised by the demurrer. It was that the law was constitutional because it was legitimate to exempt a class of property from taxation and to do it upon condition of the owners paying a stated compensation "to the treasurer of the state for the use of the state" in lieu thereof. Here, in 1881, we find the most emphatic declaration that the basis of the former decision was that the early law did not deal with the imposition of taxes such as are mentioned in the constitution, but with exemptions therefrom in consideration of the rendition of an equivalent for the privilege. We should say in passing, in order not to have its importance overlooked, that the idea of compensation for the privilege of operating the road was not then thought of, because it was not, as we shall see, a feature of the old law, but was added in response to a judicial suggestion in the law of 1860.

The question has been, even, suggested at this late day as to whether the memorandum to which we have referred is the one mentioned by Justice Cole as containing the statement of "points decided, written out by one of the members of the court." That idea springs up, so to speak, the product of imagination, as it were, when stimulated by interest, to avoid the letter or spirit of the early decisions, as persistently as the ghost in the play, though in fact it was as surely buried beyond power of resurrection as was the murdered Banquo. Why it should, after the lapse of half a century, and after having been repeatedly demonstrated to the contrary, be

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thought to be a legitimate subject of controversy somewhat passes comprehension. In *Kneeland v. Milwaukee,* 15 Wis. 454, Justice PAINE, speaking of the source of information at hand as to the nature of the decision in the early case, said: "We get this from a written statement of the points decided, made soon after the decision, by the judge, then acting as reporter, and to whom the duty was assigned of writing the opinion," speaking of the identical paper, manifestly, from which we have quoted. Still further, in the opinion by the present chief justice, to which we have before referred, that same paper is indorsed as the one referred to by Justice COLE in *Knowlton v. Rock Co.* 9 Wis. 410. Then we find it incorporated in the original report of the case found in vol. 9 of the old edition of our Reports prepared by SMITH, ex-associate justice, acting as reporter, with his own certificate that it is the only opinion ever written in the case. If that, in the whole, does not put the truth of the matter beyond all reasonable doubt, then there is little use of effort to discover truth by evidence. The only reasonable explanation of the mist that has seemed to surround this matter for years is that the statement in the decision that the law of 1854 does not "impose a tax within the meaning of the constitution" voiced the deliberate judgment of Chief Justice WHITON and Justice SMITH, with which Justice COLE did not altogether agree, he believing that it was an exaction "in lieu of taxes ordinarily imposed: a condition of exemption from ordinary taxation and so taxation in the just and proper sense of that term;" really a distinction without a difference, since an exaction in lieu of ordinary taxation may well be a "tax in the just and proper sense of the term" and not be taxation on property "within the meaning of the constitution."

Having now shown clearly, as we think, that the controlling idea in the early decisions was as we have indicated, it next becomes important to show how the change came to be made

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in the act of 1854 by the act of 1860. That legislation occurred while it was supposed the former was fatally defective. The legislature *ex industria,* as we shall show, endeavored to remove all features of the law of 1854 which gave rise to the idea in the minds of some that it was a taxing law to be tested by sec. 1, art. VIII, of the constitution.

It must be kept in mind that the legislature, in framing the new act, had the benefit of the suggestions of the three justices, DIXON, PAINE, and COLE, who participated in making the decision condemning the early act as unconstitutional, the opinion of Judge HUBBELL we have referred to, and the three opinions in *Knowlton v. Rock Co., supra.* The nullifying decision was filed early in the January term of 1860. It was a startling revelation of the supposed weakness of one of the most important revenue measures of the state. It cut off most unexpectedly, since it was supposed the validity of the law had been firmly established, a most significant source of public revenue. That naturally stimulated the legislature to exercise all the care that could be devoted to the subject, to apply an efficient remedy: to devise a scheme that could not be condemned because an unconstitutional taxing measure for any of the reasons suggested as to the former law.

The nullifying decision must have been carefully studied. There is abundant evidence of that. It was noted that Justice PAINE, in delivering the leading opinion, said, in effect, that the law of 1854 could not be sustained under the *police power* because "a license is an authority granted to do that which the licensee might not legally do without it" and that the primary object in such a law is regulation, the revenue feature being a mere incident. It was further doubtless noted that he said the law did not contemplate *compensation for the privilege of exercising the rights granted by the charter,* "for that the charter gives, and the act does not profess to give it." It was further observed that he gave significance to the fact that "the legislature," as he said, "did not call

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the tax a license, *but honestly called it a tax, as it is beyond question.*"

Likewise it was doubtless appreciated that Justice COLE was of the opinion that the percentage payment was required to be made as an equivalent for the advantage secured by the exemption from ordinary taxation; that such was the basis for the views of Justices WHITON and SMITH that the exaction was not a tax in a constitutional sense, since it could not be in lieu of a thing and be that thing also; and that Justices DIXON and PAINE could not agree with that because of features in the law inconsistent, to their minds, therewith.

In addition to the judicial suggestions the legislature had the benefit of the exhaustive argument of Mr. Ryan, wherein he presented, with great clearness and force, the view that the rule of taxation mentioned in the constitution refers to the *ad valorem* method of taxing property; that the words referring to property in connection with those expressing the idea of uniformity of rule made the former words of limitation as to subjects of taxation, and the latter words of limitation as to the methods of taxation, applying the maxim, as he thought should be done, *expressio unius est exclusio alterius.* That, of course, has not been indorsed by the court so as to exclude other forms of taxation than that on property. The circumstance is simply mentioned, among others, to show the situation under which the legislation of 1860 occurred. We may well say, however, in passing that the rule of construction which Mr. Ryan insisted should be applied was, during the time the constitutional convention was dealing with the particular subject, stated by one of the ablest lawyer members of the body to be the one which their perfected work would subsequently be tested by.

Now, in drafting the new law, the first feature of the former act, that in relation to the return of gross earnings, was, as we have seen, left as before. There was no possible doubt at that point.

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Taking up the next feature: the one which made the court, speaking by Justice PAINE, regard the act of 1854 beyond room for reasonable doubt a taxing law under sec. 1, art. VIII, of the constitution because of the words "which amount of tax shall take the place and be in full of all the taxes . . . upon said roads," it was wholly discarded.

In view of the significance accorded to the feature of the law that the exaction could not be regarded in any sense as a license as "it does not purport to be a license," in the opening lines of the new act it was provided that every railway company "shall apply for and obtain a license."

Noting the importance given in Justice PAINE'S opinion to the fact that the percentage payment provided for in the old law was not called compensation for the exercise of the franchise, and his suggestion that a license under the police power necessarily contemplates regulation primarily and incidentally revenue, and further the intimation that an exaction "analogous to the requiring of a bonus for the granting of charters" would not be an exercise of the taxing power, strictly speaking, in the new act the idea that the payment should be regarded as *consideration for the privilege of operating the road* and the evidence of the acquirement of that privilege *a mere certificate* of the facts as regards the making of the return and the payment of the percentage on gross earnings, was made prominent.

Then, whereas the old law was labeled "An act taxing railroads," etc., the new one was characterized in its title "An act regulating railroads."

Thus it will be seen that every judicial suggestion made in the three cases as to the former act being a taxing law under sec. 1, art. VIII, of the constitution was met in the new one exclusively and inclusively. The language in the former as to the exaction being in full for taxes was *ex industria* omitted. Care was exercised even to avoid using an expression conveying the idea that the exaction was to be

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even in lieu of taxes. The idea that the act might be claimed to be a police regulation from the mere fact that application for a license was required, was repelled by the evidence of payment being denominated a "certificate to be evidence of the facts therein stated." The ideas of compensation for the right to exercise the franchise, analogous to a bonus for the corporate privilege of operating the road, though not that strictly speaking, impliedly suggested by Justice PAINE as legitimate, were adopted in place of the idea of payment of a sum of money "to take the place and be in full of taxes" or a consideration for exemption from taxation. To make it doubly sure that the new enactment would not be regarded as having any of those features which had led the court to hold the old one was void under sec. 1, art. VIII, of the constitution, and at the same time preserve, so far as it could be safely done in the light at hand, the feature of compensation to the state as an equivalent for exemption from ordinary taxation as well as compensation for the privilege of operating the road, as a companion piece of legislation an act was passed exempting railroad property from taxation, but without referring to the regulating act, so called.

In the Revision of 1878 the features of the law of 1860 were emphasized by making the obligation to pay the state a part of the gross earnings as compensation for the privilege of operating the road more prominent somewhat than before, and making the exemption of railroad property one of the features of the general statutory treatment of that subject, and without any express connection thereof with the other provision. True, the latter was included in a chapter on taxation under the head of taxes on various kinds of property, all indirect however, most of which were included in the exempt classes, but so was the scheme for obtaining revenue from insurance corporations, foreign and domestic. No one would claim that the exaction from that source is a tax in a constitutional sense. The idea was expressly rejected in

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Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, Justice WINSLOW saying for the court: "It is not a tax under the decisions of this court." Such exactions are, as we have seen and will still further see, privilege taxes involving necessarily the element of contract.

With this history, why even adhere to the idea industriously discarded by the legislature in the act of 1860, that the system then so carefully devised, in a legal sense provides for payment of a percentage of gross earnings of railways to the state as consideration for exemption from taxation, though we do treat it as such in practical effect? Why not regard the purpose of the law to be in a legal sense what it says it is: one to obtain from railroad companies a part of their gross earnings as compensation for the privileges accorded to them to operate their roads and carry on their business; that the law, while referable in the broad sense to the power of taxation, involves an exchange of equivalents, a proposition by the state to accord certain privileges on condition, and an acceptance thereof? That would be its nature even if the exaction were in lieu of ordinary taxes, as we shall see, but more appreciably so in case of the new feature.

That the efforts of the legislature have since been supposed successful, is evidenced by the fact that in more than forty years that have elapsed since the enactment it has never been seriously questioned. The decision in *Kneeland v. Milwaukee,* 15 Wis. 454, was made some two years thereafter, but the action was commenced theretofore and involved only the act of 1854. The new enactment was referred to by Justice PAINE as if he regarded it in the light, somewhat, of an endeavor to do the same thing purposed by the old law, but in a new way. However, no opinion was expressed as to its legal character and none was called for. It was a valid enactment necessarily, since the former one was, and it is difficult to see how the result could be otherwise if the court had adhered to its condemnation of the earlier law. It has

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never been held by this court a taxing law in a constitutional sense. It has never been analyzed and passed upon, the whole subject being allowed to rest on the adjudication as to the act of 1854. It could not be reasonably held a law for the ordinary taxation of property in face of the history we have given. Courts elsewhere are in harmony with these views, but our own decisions are so unmistakable on the subject that we shall not review or cite others except as it may be incidentally done in treating another branch of the case.

In view of the foregoing we can without further discussion eliminate some elements from the case which were exceedingly troublesome at the start in determining the right of the matter in controversy: elements the continuance of which as significant in the case would seem to require affirmance of the judgments.

If the legislative idea was a penalty for failure to pay a tax strictly so called, which it is not, it could no more be forgiven for mistake, whether excusable or not, than that to which it is incidental. As soon as the default occurred the penalty would be regarded in legal effect as part of the tax, especially since the law provides for an absolute forfeiture. We venture to say that in all tax laws where it is provided that upon default in payment being made a certain amount in addition to the tax shall be forfeited, upon the forfeiture occurring, the penal sum is regarded to be as fixed and certain in its obligatory feature as the tax itself. It is said, in effect, in 2 Cooley, Taxation (3d ed.) 900, that a penalty for neglect to pay a tax constitutes an addition to the tax. Judicial authorities so hold. *Louisville City R. Co. v. Louisville,* 4 Bush, 478; *Burlington v. B. & M. R. Co.* 41 Iowa, 134; *High v. Shoemaker,* 22 Cal. 363; *Kansas Pac. R. Co. v. Amrine,* 10 Kan. 318. That such was the intention of the legislature expressed in the act before us, especially in view of the significant word "absolutely," and that nothing but mere default is essential to its activity, would seem too clear

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to be gotten rid of by any reasoning yet presented, if we were to regard the law as a taxing measure independently of any contract feature.

We venture the assertion that no authority can be found nor principle referred to sustaining the proposition that a statutory penalty for failure to pay an ordinary tax can be avoided on the ground of mistake or discharged otherwise than by full payment. The cases cited by respondent, *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696; *State v. Alta S. M. Co.* 24 Nev. 230, 51 Pac. 982, and *State v. Carson City Sav. Bank,* 17 Nev. 146, 30 Pac. 703, are to that effect, so far as they go. They do not apply to the case in hand because it does not relate to ordinary taxes.

If the law was a police regulation, which it is not, such a penalty for the transgression would be enforceable regardless of whether it was wilful or by mistake, excusable or inexcusable. The following cases cited by counsel for respondents are to that effect: *Brig Ann,* 1 Gall. 62, Fed. Cas. No. 397; 3 Greenl. Ev. (16th ed.) § 21; *Barnes v. State,* 19 Conn. 398; *Comm. v. Mash,* 7 Met. 472; *Comm. v. Boynton,* 2 Allen, 160; *Comm. v. Raymond,* 97 Mass. 567. But they do not apply. The cases and others of the same character which might be referred to, involve such transgressions as selling adulterated milk; selling liquor without a license; keeping naphtha for sale under a false name; furnishing liquor to minors; selling liquor to intoxicated persons; failure to cancel revenue stamps, and the like, contrary to law. In all such cases upon the general principles applicable to police regulation it is held that guilty knowledge or bad intent is not essential to the forfeiture unless the law makes it so. The principle does not apply here.

For the reasons already given, authorities cited by counsel for appellants dealing with statutes for the punishment of occurrences which, in their commission, necessarily involve the element of bad intent, do not apply, nor do statutes of a

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penal nature, remedial in character in favor of the injured person for an act akin to one involving criminality, such as *Cohn v. Neeves,* 40 Wis. 393, and *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 6 N. W. 508.

Neither, it seems, would *Schumacher v. Falter,* 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826, and like authorities involving remedial statutes in aid of the enforcement of obligations growing out of contract relations apply, if the law, as claimed by counsel for appellants, was strictly speaking a taxing measure. We would then have to enter another and entirely different and, to our mind, barren field, to find clear warrant for reading out of it a meaning other than that which its literal sense suggests, since that was made so emphatic by use of the word "absolutely."

The taxing law, so called, under consideration, in the whole, as indicated, involved, in legal effect, an exchange between the state and the railroad company of equivalents. The former accords the latter the privilege to operate its roads; the latter, in consideration thereof, renders to the former a proportion of its earnings. By operating the road the company impliedly promises to pay the state the specified compensation for such privilege, which is fixed and certain, since it is based on past business. The state by permitting the operation of the road acquires as an asset the statutory right to the specified proportion of the previous year's gross income. That constitutes an indebtedness definite as to amount and time of payment, dischargeable only by payment like any other absolute obligation on contract for the payment of money, and collectible by ordinary remedies in case of default, if necessary. It is quite different in that respect from a tax in the ordinary sense, in that in the latter there is no element of contract involved and ordinary remedies are not usable to enforce payment in the absence

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of statutory authority. We have adverted to that before, but it is so important in this case that we will add a little here to what has been said.

There is some confusion in judicial expressions as to whether an ordinary tax is a debt. Because it is a liability, it will be found sometimes spoken of as the former, no idea of the contractual element necessary to one strictly so called being in mind. As a rule, whenever any court has been required to decide whether such a tax involves such element the decision has been in the negative. One might easily be misled by reading the different expressions even of the same court on the subject, if the circumstances under which the varying expressions were used are not taken into consideration. For examples, in *Warden v. Fond du Lac Co.* 14 Wis. 618, 620; *Peters v. Myers,* 22 Wis. 602; *Marsh v. Clark Co.* 42 Wis. 502, 509; *Flanders v. Merrimack,* 48 Wis. 567, 572, 4 N. W. 74; *State ex rel. Davis & Starr L. Co. v. Pors,* 107 Wis. 420, 425, 83 N. W. 706—an ordinary tax is in each instance spoken of as a debt, the precise nature of the liability, however, not being involved. In *In re Assignment of Riddell,* 93 Wis. 564, 67 N. W. 1135, such question was directly involved and the conclusion was that such taxes are not debts in the ordinary sense, Cooley on Taxation and other authorities being cited, which hold that they do not involve any contractual element. Again at one time in Iowa the court was inclined to treat such taxes as debts, and to hold that ordinary remedies were usable to collect them. During such period they will be found spoken of as debts, though there was not entire harmony, by any means, as to whether they were collectible as ordinary contractual obligations, nor was there any definite decision to that effect. *Dubuque v. Ill. Cent. R. Co.* 39 Iowa, 56; *Burlington v. B. & M. R. Co.* 41 Iowa, 134. Later that idea was criticised and still later entirely discarded. *Marshall Co. v. Knoll,*

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102 Iowa, 573, 69 N. W. 1146, 71 N. W. 571; *Crawford Co. v. Laub,* 110 Iowa, 355, 357, 81 N. W. 590; *Plymouth Co. v. Moore,* 114 Iowa, 700, 701, 87 N. W. 662.

All text-writers and judicial authorities substantially agree that the distinguishing feature between a debt and a tax, in the ordinary sense, is that in case of the former there is express or implied promise to pay, enforceable by ordinary remedies, and in case of the latter such element does not exist and such remedies are ordinarily not applicable. *Carondelet v. Picot,* 38 Mo. 125; *Peirce v. Boston,* 3 Met. 520; *Camden v. Allen,* 26 N. J. Law, 398; *State ex rel. Hayes v. Snyder,* 139 Mo. 549, 553, 41 S. W. 216; *Blevins v. Smith,* 104 Mo. 583, 595, 16 S. W. 213; *Augusta v. North,* 57 Me. 392; *Shaw v. Peckett,* 26 Vt. 482; *Loeber v. Leininger,* 175 Ill. 484, 51 N. E. 703; *Mechanics' & T. Bank v. Debolt,* 1 Ohio St. 591; *Danforth v. McCook Co.* 11 S. Dak. 258, 76 N. W. 940; *Hibbard v. Clark,* 56 N. H. 155; *State v. Southwestern R. Co.* 70 Ga. 11; Burroughs, Taxation, § 105; Blackwell, Tax Titles (5th ed.) § 335; 1 Desty, Taxation, § 6.

A few quotations from the cases cited will indicate how very emphatic the distinction we have pointed out is made by the authorities.

"Nor are taxes contracts between party and party either express or implied." SHAW, C. J., in *Peirce v. Boston, supra.*

"The existence of a contract either express or implied is the ground on which interest is generally allowed. The assessment of taxes does not create a debt that can be enforced by suit or upon which a promise to pay interest can be implied." ISHAM, J., in *Shaw v. Peckett, supra.*

"A tax in its essential characteristics is not a debt, nor in the nature of a debt." "It is not founded on contract or agreement." "A debt originates and is founded upon contract, express or implied." "Unless the power is expressly delegated or expressed, no right of action exists for taxes." WAGNER, J., in *Carondelet v. Picot, supra.*

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"Taxes are not debts in the ordinary sense of the word." "They are not contracts either express or implied. They cannot be collected by suit at law in the absence of express statutory provision." *State v. Southwestern R. Co., supra.*

Recurring to the character of the law under consideration, the feature as to the report is a mere instrumentality to enable the state to determine the measure of the consideration to be rendered to it as the equivalent of the privilege it accords. The issuance of the license creates evidence, but *prima facie* evidence only, of full payment of such consideration. The requirements as regards the report and the license being such mere instrumentalities in aid of collecting the compensation to be rendered to the state, are not the measure of it. The penal provisions, the same as those relating to the report and the license, are merely administrative in character, intended to operate persuasively as regards performance of duty, the primary duty being to fully perform the agreement to pay the specified percentage growing out of the acceptance of the offered privilege to operate the road, and intended also to operate punitively as to the nonperformance of duty. We cannot emphasize too much that difficulty has grown out of confusing the power of taxation under sec. 1, art. VIII, of the constitution, the police power, and power as to privilege taxes involving the contracting power to some extent. In no field is that more apparent than in that of dealing with laws of the character of the one under consideration. It has been significantly in evidence in this case in the treatment of the subject by the learned counsel for the respective parties. It has many times been held that a law exempting property from taxation coupled with an obligation to contribute to the public funds other than by taxation in the ordinary sense: direct taxation of property, in consideration of some privilege granted by the state within its power to grant, refuse, or prohibit, is valid and creates a contract between the owner of the property and the state.

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Louisville City R. Co. v. Louisville, 4 Bush, 478; *Newport v. South Covington & C. R. Co.* 89 Ky. 29, 11 S. W. 954; *Pac. R. Co. v. McGuire,* 20 Wall. 36; *State v. Miller,* 30 N. J. Law, 368; *Mobile & O. R. Co. v. Tennessee,* 153 U. S. 486, 14 Sup. Ct. 968; *Wilmington & W. R. Co. v. Alsbrook,* 146 U. S. 279, 13 Sup. Ct. 72; *Mobile & O. R. Co. v. Moseley,* 52 Miss. 127; *State Board v. Morris & E. R. Co.* 49 N. J. Law, 193, 7 Atl. 826; *Dodge v. Woolsey,* 18 How. 331; *State v. Butler,* 86 Tenn. 614, 8 S. W. 586; *Detroit City St. R. Co. v. Guthard,* 51 Mich. 180, 16 N. W. 328. No constitutional provision on the subject of taxation of property is involved in such a law except that feature permitting exemptions from taxation.

In the very latest expression of the federal supreme court on this subject (*Powers v. Detroit, G. H. & M. R. Co.* 201 U. S. 543, 26 Sup. Ct. 556), the law then under consideration characterized the exaction as a tax and so it was called over and over again in the opinion by Mr. Justice BREWER. But it was held that the obligation upon which it was based was contractual and the court treated the law as not dealing with taxes in the ordinary sense. It provided that "said company shall, on or before the 1st day of July, pay the state treasurer an annual tax of one per cent. on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except penalties imposed upon said company by its act of incorporation or any other law of this state. The said tax shall be estimated upon the last annual report of said corporations." The enactment was in the nature of an amendment to an existing corporate charter enlarging the original scope thereof. The court held that the legislation and the action of the railroad company in respect thereto created a contract *inter partes;* that the tax, so called, which it contemplated, was one based on such contract and hence that the state could not violate the obligations thereof any more than it could those of any other contract. We should say in passing that the circumstances of the case did not

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render necessary consideration of the subject of altering a corporate charter under reserved power in that regard.

Now can there be any reasonable doubt, on principle, that such a law as that of 1860 is in the nature of an act amending existing corporate charters under the constitutional reservation of the right to do so, and that a subsequent exercising of corporate rights created contractual relations between the state and the corporation as regards the new feature the same as if such feature were originally made a part of the charter? No one will doubt but what the grant of a charter and its acceptance creates a contract between the grantor and the grantee, or but what after such acceptance the contract could be changed by the legislature under the reservation of authority in that regard in the constitution, which is regarded as written in every corporate charter, so long as it acts reasonably. This court passed upon that in *Att'y Gen. v. Railroad Cos.* 35 Wis. 427, and it is familiar law. Where is there any room to escape the conclusion that a law of the nature of that under consideration, the same as the rate law considered in the case cited, is such an amendment and while referable to the power of taxation in a general sense is, otherwise, referable to inherent contracting power, the constitutional reservation of authority to vary contracts between the state and corporations involved in corporate charters, and the power to exempt property from taxation? Call the exactions under the railway license law taxes, and we may, and properly so, in the sense that they constitute part of the state revenues, they are yet not strictly such in the sense that they spring from activity of the taxing power in a constitutional sense: the power to tax property. No court has ventured to say that they are taxes in any other sense than that the law authorizing them is a revenue law, and that the result of its execution is the same as that of a taxing measure, strictly so called, as regards affording the necessary means to meet public expense.

There can be no difference as regards contractual relations

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between an accepted offer to a foreign corporation and one to a domestic corporation of the privilege to do business in the state, the condition of the offer being the rendition of a stipulated revenue to the state. In the latter circumstances upon due consideration this court held that the transaction in legal effect involved an implied promise to pay according to the terms of the offer. *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 74 N. W. 372, 78 N. W. 407; *State ex rel. Fidelity & C. Co. v. Fricke,* 102 Wis. 107, 77 N. W. 732, 78 N. W. 455; *State v. Nat. Acc. Soc.* 103 Wis. 208, 79 N. W. 220.

The idea suggested that the exaction of compensation from a domestic corporation for the privilege of exercising its franchises within the state, as regards the contractual feature, is the same as such an exaction of a foreign corporation, making the decision in *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, directly in point in the present discussion, is fully supported, if support therefor were needed, by the decision in *State v. Grand Trunk R. Co.,* opinion by Mr. Justice FIELD, 142 U. S. 217, 12 Sup. Ct. 163, by this language:

"The privilege of exercising the franchises of a corporation within a state is generally one of value and often of great value. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state *whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interests or policy.*"

The irresistible logic of these cases and the principle to which we have referred compels the conclusion that an accepted offer, under the system of legislation here, creates contractual obligations that cannot be discharged otherwise than by rendering the full amount contemplated by the promise. In *State v. Nat. Acc. Soc., supra,* the action on implied contract for arrears covering several years was sustained, and

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during all that period the debtor, so to speak, possessed a license issued in due form, but under mistake as to the right thereto.

On the question of whether the law under consideration is referable to the constitutional power to exempt property from taxation and to do it by contract, not to the power in a constitutional sense to tax property, and referable to the power to amend the contractual obligations existing between the state and the grantee of its corporate franchise, we have rested, especially on the last proposition, largely on principle, but the subject has been passed upon by courts in the very broadest aspect of the matter we have taken and in harmony with the views we have expressed. In *Jersey City G. L. Co. v. United G. I. Co.* 46 Fed. 264, the subject treated was whether such a law as we have here is a taxing law, under a constitutional provision like our sec. 1, art. VIII, in all essential particulars, or an amendment of the corporate charter under the reserved power in that regard varying the contract between the state and the holder of the franchise by imposing a new condition on the enjoyment of the corporate privilege. The similarity of the law in question there to the one here can be best appreciated by the following quotation from the former:

"Every telegraph, telephone, cable, or electric light company, every express company not owned by a railroad company and otherwise taxed, every gas company, palace or parlor or sleeping-car company, and every oil or pipe-line company, and every fire, life, marine, or accident insurance company, doing business in this state, except mutual fire insurance companies which do not issue policies on the stock plan, shall pay an annual tax, for the use of the state, by way of license for its corporate franchise, as hereinafter mentioned."

There were further provisions as to return of gross earnings, the percentage of such earnings to be paid, and the remedies for failure to pay. The law was evidently passed to

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place the taxation of such corporations under somewhat the system for taxing railroads. The administration of the law in part was delegated to the railway and canal commission. The federal circuit judge in deciding the issue said:

"When the legislature grants a charter of incorporation, it confers upon the grantees of the charter the right or privilege of forming a corporate association, and of acting, within certain limits, in a corporate capacity, and this right or privilege is called the 'corporate franchise.'" "The legislative authority in making a grant of such franchise can prescribe such terms and such conditions for its acceptance and for its enjoyment as to it shall seem best." "It is true that such grants are said to be in the nature of a contract. But if the right to amend or to alter or to repeal the grant be . . . reserved . . . the terms and conditions originally annexed to the grant, although accepted, . . . do not become irrepealable contracts, but may be altered . . . at the will of the grantor." "It has seen fit to exercise this discretion, and to impose upon the plaintiff a new condition, upon compliance with which it can continue to enjoy the franchises," being "the payment of an annual tax, or charge, or impost by way of license." "Its franchises are preserved to it, but the use of those franchises is made to depend upon the payment of the license fee." "It is difficult to imagine any other construction which will preserve the least harmony between the act in question and the constitution of the state."

We have quoted thus at length because the case so clearly declares and applies the views we have expressed. The federal court, in making the decision, cited and followed the decision in *Standard U. C. Co. v. Att'y Gen.* 46 N. J. Eq. 270, 19 Atl. 733, which involved a railroad taxing law substantially like the one under consideration. The contention was made that the law was void under the clause of the constitution similar to our sec. 1, art. VIII. The court answered it thus:

"The fault of this position is the assumption that this tax is one upon property. Such manifestly is not the case. The law imposes a tax by way of a license for exercising corporate

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franchises." "Upon the power of the legislature to impose such a tax there exists no restriction in our constitution. As a license or franchise tax it is not within the equality clause of the constitution" in relation to the taxation of property.

Before we proceed to apply the foregoing we desire to further emphasize the idea that the railway license taxes, so called, are properly referable to the taxing power in the broad, "the just and proper sense, of the term." The saying, they are not taxes "in a constitutional sense," means they are not those enforced proportional contributions, from or on account of property, for the public needs, mentioned in sec. 1, art. VIII, of the constitution: taxes involving the mere reciprocal duties of support and protection as between the sovereign and those in its jurisdiction, and not characterized at any point in the process by which the contribution reaches the public treasury by implied promise to pay, in a contractual sense. It is a special form of taxation: of raising revenue, and so, properly speaking, means the exercise of taxing power. It differs from the ordinary form, mentioned and having its special limitations in the constitution, in that it is neither direct on property nor does it involve merely the reciprocal duties mentioned. The addition to the public funds is made, in any instance, by the process of offering a privilege, under sovereign control to do so or not, and an acceptance, with the resulting element of implied promise to pay the required compensation. In that lies the contractual feature. While such process, to a greater or lesser degree, has the element of compulsion, very much as in case of ordinary taxes, yet the initiative is in the nature of an offer of something which, in contemplation of law, the sovereign may bestow or not at its pleasure, and with or without conditions, and which in such contemplation the one to whom the offer is made is at liberty to accept or reject. In case of the former alternative being chosen, by operation of law, on familiar principles, the implied promise to pay re-

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sults, which must necessarily be of the same dignity as any other such promise, as regards rights and remedies. True, the interest, and in that sense the liberty, to accept or reject the offer and privilege, is much greater in case of its being contained in the charter of a corporation at the beginning than when made thereafter. True, such an offer at the start and acceptance, having no necessary reference to taxation, might doubtless be regarded as the mere sale of a privilege: a matter resting wholly in contract and so not referable to the taxing power at all. But if at the beginning, expressly or plainly, the contribution is contemplated to be in lieu of ordinary taxation, as taxation in an indirect way and in general effect, as in the instances cited in the opinion, and as is commonly the case, then it may well be regarded as a tax, in the broad sense: an exaction referable to the taxing power, with the contractual element, however, specializing it. In that view, such an exaction, it would seem, should be regarded and treated the same as one under a general law, making submission thereto a condition of continuing existing corporate privileges or business, as regards the contract feature.

Further, on the matter last mentioned, we refer to *State ex rel. Bain v. Seaboard & R. R. Co.* 52 Fed. 450. There an exaction of an annual payment to the state as a condition of exercising an accepted corporate franchise, the same to be in lieu of all other taxes, was held to be a matter of contract, and that it would be difficult to sustain the tax under the constitution as a property tax. The action was to recover arrearages for twenty-five years. It was held that the exaction was something due to the state, but not in the nature of taxes on property. "The right of the state," said the court, "to collect the amount sued for does not grow out of its power to tax, but out of its power to charge a price for the franchise granted." "It is not a tax on the property of the road." "It is an imposition annexed to the franchise . . . ; the contract price to be paid . . . for the franchise granted." For

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that reason it was said that no technical rules relating to taxes are involved. The right of the matter depends "on the ordinary rules relating to the construction of contracts." "The tax is a charge agreed upon between the parties and has nothing to do with anything other than the contract itself." In that view and under the law as regards the statute of limitations on contract obligations to the state, the right to recover for the twenty-five years of arrearages was sustained.

The most serious difficulties in this case have now been cleared away, including the ground, it seems, upon which the learned trial court based the judgments appealed from. In this we assume that it was thought the matter should be treated the same as penal statutes in aid of the collection of taxes, or a police regulation, and that the words "or any part thereof," which originated in the law of 1862, where permission to pay in instalments was granted, made the penalty apply to a part, however small, the same as to the whole. Such statutes in aid of the enforcement of duties springing from contractual relations do not seem to have been given careful, if any, consideration. Manifestly there is a wide difference between laws relating to the former and those relating to the latter. In construction there is quite as much difference in degree, though the manner of treatment is the same, between the two, as there is between the former and a stipulated forfeiture in private contracts. Numerous instances might be referred to, where remedial statutes to secure performance of contractual duties have been held, notwithstanding their literal sense to the contrary, to apply only to cases of failure to perform through inexcusable conduct. *Schumacher v. Falter,* 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826, are significant cases on that in this state and have established a definite rule here on the subject. They are to the effect that excusable mistake, whether of law or of fact, prevents infliction of a statutory penalty merely designed to stimulate performance

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of contractual duties or punish failure to perform, in the absence of something in the law expressly indicating to the contrary; that mere general language, covering defaults without express exception or qualification, will not be held to apply to failure of duty from honest belief, based on reasonable ground, that the circumstances existing do not give rise to duty of performance. The basic theory of these cases is that the court will apply substantially the same rule of construction to such statutes as is applicable to stipulated forfeitures in ordinary contracts, to the extent of determining whether they were intended to apply literally or not, the presumption being indulged in, that nothing absurd or unreasonable was in the legislative mind, and that when the literal sense would lead to the contrary it should be restrained accordingly, by a somewhat arbitrary assumption that the legislature had in mind defaults only of a nature in harmony with the remedial feature provided, in the absence of some clearly expressed indication to the contrary. That rule for construction may not, as said in *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490, be very logical, but it is a just one and has been so firmly established that it may well be thought to be in the legislative mind in enacting laws, the same as it is presumed to be in the minds of parties in entering into contractual relations.

The foregoing stated principle rules these cases in favor of the appellants, unless we can discover in the law the negative indication suggested. On this the significant word "absolutely" preceding the word "forfeit" before referred to is prominent. It is suggested that the interpolation of that word made in the Revision of 1878 did not add to the word "forfeit" standing by itself. That may be so in the abstract, but it does not follow that the legislature used the additional word purposelessly. We must assume to the contrary, by a very familiar rule of construction. That assumption will not down easily under the circumstances we have

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here. The revisers could have joined the penal provision of sec. 184, ch. 18, R. S. 1858, the particular one involved here, and the penal provision of the act of 1860, making a perfect piece of legislation, without the use of the word "absolutely," so industriously interpolated. We do not overlook the fact that the revisers failed to record in their notes any reason for the change. Giving due consideration to this it does not help the matter materially. We cannot escape from the conclusion that the addition was made advisedly and for a particular purpose well defined in the minds of the revisers and the mind of the legislature. If that purpose was to negative the idea that in case of default in any respect, circumstances might efficiently excuse it and prevent the forfeiture, then the rule of the cases cited cannot prevail. Here, again, the doctrine applies that a meaning should not be attributed to the legislature, convicting it of unreasonable or absurd action, if that can be avoided.

It goes without saying that in making a report by a railroad company of its gross earnings covering a year's business, and making the payment which the statute requires, there is room for many mistakes of an excusable nature: mistakes involving trifling or very large sums: mistakes of law and mistakes of fact, or both: mistakes requiring the best of expert accountants, and the highest order of legal and judicial ability to determine the right of the matter. If the penal provision has the broad application contended for by respondent, upon default in payment of any considerable part of the license fee, let it be $500 or $100,000, any part, however small, so long as it does not fall under the rule of *de minimis non curat lex,* up to the whole, even without the circumstances characterizing the default being such as to indicate any real fault whatever, the forfeiture would be incurred, without hope of relief. The circumstances might be such as to exhaust all the instrumentalities of the law in honest controversy, before vindication of the right could be secured,

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and yet the forfeiture would follow just the same as in case of manifest fraud or inexcusable neglect. It does not seem possible that the legislature could have so intended. The contrary would shock the conscience of any considerate man. The contemplation of it gives the judicial mind pause and compels diligent search for some other intent, fairly expressed. If the failure to make a correct report and pay the full amount could result in any permanent loss to the state, it might change the picture. There would then appear to be some warrant; perhaps a good one: an efficient one, for so drastic a statute as the learned trial court regarded the one in question to be. But such is not the case, as we have perhaps sufficiently shown.

As indicated at the start, we would have preferred leaving the question last suggested for future decision, but the necessities of the situation preclude it. That compelled broadening our consideration of the cases, so as to include several matters which would otherwise have been omitted. The whole case might, under some circumstances, have turned on whether failure to pay would necessarily result in any loss to the state. In that condition of the law reason for a pretty harsh penalty for even a mistake would exist. A strong stimulus to exercise extraordinary care would not be unreasonable. Since there is no such danger there is no reason for applying so drastic a penalty as the one under consideration, for neglect not involving any real fault. Not only is the right of the state to the full amount of the percentage of gross earnings not impaired by its having acted upon the erroneous report, but it doubtless had the remedy, among others, to enforce the obligation suggested by the words of sec. 1212, that the license granted in any case shall be good for a year "unless sooner revoked." It is suggested that the reserved power of revocation was granted with reference to the second half of the license fee payable six months after the issuance of the license. We see no good reason for so restricting the meaning. The power of revocation, it seems,

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was intended for use in any case of default, the same as was held in regard to licenses issued to insurance companies. *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 74 N. W. 372, 78 N. W. 407.

In fencing this case within the very narrow compass indicated, by putting outside the pale the idea that the law is referable to ordinary taxing power, the one that it is referable to the police power, and the idea that default in making voluntary payment of the full proportion of earnings due the state could prejudicially affect its right to recover the balance—and reducing the situation down to one of mere innocent breach of obligation to voluntarily pay the full sum of money due on implied agreement: fully remediable by action of debt as in *State v. Nat. Acc. Soc.* 103 Wis. 208, 79 N. W. 220, and *State ex rel. Bain v. Seaboard & R. R. Co.* 52 Fed. 450, leaving no reason for an absolute forfeiture to cover a possible loss—we still are confronted by the fact that the legislature must have considerately emphasized the word "forfeit" by adding thereto the word "absolutely." We cannot put that aside lightly. If put aside at all, it must be done by reasonable construction, not by arbitrary rejection because of the thought that the meaning of "forfeit" is not, in the abstract, made different by using it in connection with the adverb "absolutely."

The unreasonableness, nay the absurdity, of the literal sense of the words under consideration in view of the case as we now find it, compels turning aside therefrom if any way can be discovered which may fairly be said to have been intended by the legislature.

It seems that such a way is open and is now quite plain. The legislature did not intend the forfeiture to apply in case of excusable mistake of fact or law or both, one involving some matter of doubt or difficulty of such serious nature as to reasonably require judicial interference for its solution. We are permitted to hold that by familiar rules of construction. It appreciated, or must be presumed to have appre-

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ciated, that the penalty was made incidental to breach of a contract obligation and that as such it might be regarded, if the idea was not expressly repelled in some way, as open to the liberal treatment customarily given by courts to penal provisions in contracts between private persons, as intending that in case of inexcusable default the penalty should be regarded in the nature of stipulated damages, and as not affecting, in any way, liability upon the contract for arrears in case of the breach having relation to that subject. Such intent was made manifest by emphasizing the word "forfeit" by preceding it by the word "absolutely."

Construing the law in question as indicated, as we well may, supported by the logic we have applied to the matter, clears up all obscurities, avoids all absurdities, makes the law a sensible highly reasonable enactment in all its parts, and grounds the reversal which must result from all the considerations, on a thoroughly logical basis. It secures to the state the full consideration which the law contemplated for the privilege granted, and an additional sum by way of punishment in case of any wrong that could be reasonably dignified as such upon principles of natural justice. It cannot fairly be presumed that more was intended in the absence of language not open, reasonably, to be otherwise read. The railway companies are held immune from punishment for honest and not unreasonable defaults, while being held liable to punishment for all others and to make good to the state the full consideration impliedly agreed to be paid for the privileges enjoyed. It could not be presumed that less was intended by the legislature in view of the general nature of the enactment, and in absence of language expressly, or clearly by implication, so indicating.

By the Court.—The judgment in each of the four actions is reversed, and the causes are remanded to the trial court with directions to render judgment in each thereof dismissing the same.

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The following opinion was filed June 25, 1906:

DODGE, J. (*concurring*). I concur in the judgment of this court on the one ground, stated in the opinion, that a construction of sec. 1214, Stats. 1898, to impose the penalty by it denounced upon an entirely innocent mistake of fact or law in a *bona fide* effort to comply with secs. 1211 and 1212, Stats. 1898, would be so absurd that we cannot attribute such an intention to any legislature whose acts must be presumed to be dictated by reason. The section in question is so highly penal and so drastic as to be, in effect, a criminal statute. The legislature, if exercising reason at all, could not fail to realize that in the preparation of a report of gross earnings of a great railroad there must arise multiplicity of questions of the utmost doubt and complexity as to what properly constitutes gross earnings. Are earnings on interstate business to be included? Are receipts of money which must be repaid, such as the gross charge on mileage tickets, of which a portion is to be refunded? Are payments made between different railroads for switching, transfer, or trackage charges, or for use of each other's cars, earnings or only a method of keeping account of mutual accommodations, of which only the balance in favor of either road can be considered earned? The case of *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 24 N. W. 140, holding that only the balance of mutual account for car service is to be so considered, illustrates the opportunity for honest difference of opinion. Again, there is the probability of all sorts of errors and mistakes, even down to clerical or arithmetical ones, at the hands of the army of men of all grades of intelligence and capacity upon whose acts and statements must be based the accounts of the general offices and the report to the state. These are cogent reasons why the rules for construction and application of penal statutes announced in *Schumacher v*

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Falter, 113 Wis. 563, 89 N. W. 485, and *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826, should control. No fair reason to the contrary is apparent or is suggested in the opinion. It is said that such construction is not permissible to a statute imposing a penalty for failure to pay a tax for some occult and unexplained reason. A glance at the authorities cited must satisfy one that they have no application to such a statute as this, but merely to those augmentations of a tax which become part of and are collected with the tax in the same proceeding. Mr. Cooley (2 Taxation [3d ed.] 901) refers to cases where even such penalties have been denied, where nonpayment of a tax was due to a reasonable doubt of its validity. *Litchfield v. Webster Co.* 101 U. S. 773; *Savannah, F. & W. R. Co. v. Morton,* 71 Ga. 24; *In re Miller's Estate,* 182 Pa. St. 157, 37 Atl. 1000; *Comm. v. Phil. & R. C. & I. Co.* 145 Pa. St. 283, 23 Atl. 809. Beyond this one point I consider the discussion contained in the opinion immaterial and unnecessary. Much of it forestalls questions which we know to be presented in pending cases and which have not been argued at all fully upon either side.

I especially disagree with the contractual doctrine which I understand to be advanced in the opinion. Its fallacy is apparent from the consideration that the license-fee taxation in lieu of exemption of all other taxes applies as well to natural persons owning public utilities covered by it, and, if a contract, must be beyond the power of modification as to such persons, whatever reserved rights the legislature may have over corporations, domestic or foreign. I look upon the imposition under these license-fee statutes as "taxation" in the sense of that word in sec. 1, art. VIII, of our constitution, and think the arguments and deductions to the contrary unwarranted by anything said by this court, fairly and judicially considered, or by anything in the history of the constitutional convention.

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The following opinion was filed July 16, 1906:

CASSODAY, C. J. (*concurring*). I fully concur in the reversal of each of the four judgments in these cases. The case presented, in my opinion, fails to show that the defendants have incurred the penalty prescribed by the sections of the statutes upon which the several actions were brought. But I dissent, respectfully, from so much of the opinion of the court as holds, or tends to hold, that the exactions by the state from railway companies during the fifty years immediately preceding the present *ad valorem* tax law were not taxes upon property within the meaning of the provision of the constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Sec. 1, art. VIII, Const. I will briefly state the grounds of my dissent.

Of course, as often held by this and other courts, that provision, though affirmative in form, is not a grant to, but a limitation upon the powers of, the state legislature. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 59, 8 N. W. 833; *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 615, 43 N. W. 551; *State ex rel. Weiss v. District Board,* 76 Wis. 177, 210, 44 N. W. 967; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 146, 147, 53 N. W. 35; *Bittenhaus v. Johnston,* 92 Wis. 588, 595, 66 N. W. 805. Such limitation was for the manifest purpose of protecting citizens and taxpayers from oppressive taxation. 1 Cooley, Taxation (3d ed.) 7–10. As "the power to tax involves the power to destroy," so, in the absence of constitutional limitation, "the only security against the abuse of this power is found in the structure of the government itself," since, "in imposing a tax, the legislature acts upon its constituents." *McCulloch v. Maryland,* 4 Wheat. 316, 428; *Pollock v. Farmers' L. & T. Co.* 158 U. S. 601, 15 Sup. Ct. 912. Whether the exactions from railway companies, mentioned, constituted taxes upon such

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property, ought to depend upon fixed standards which all are bound to recognize. Certainly, such standards are not to be found in the process of reasoning—sometimes permissible—of inclusion and exclusion. To assert that taxes levied upon property for the purpose of revenue by a particular method give to the owner the protection of the constitutional provision quoted, but that taxes levied upon the same or a portion of the same property, or other property, for the purpose of revenue by a different method, give to the owner no such protection, is to declare, in effect, that such constitutional provision gives no protection unless the legislature happens to prescribe such particular method. In other words, it makes the question of such protection to turn upon the choice of methods by the legislature, notwithstanding the taxes in either case are levied upon property for the purpose of revenue. Certainly a limitation which is thus optional, or to be applied only when convenient or desirable, is no limitation.

In determining the question above suggested, and in view of the language of the constitution quoted, it is unnecessary to consider here such exactions, by way of taxes in the general sense, as are not based upon nor measured by property or the income of property, whether they are made under the police power of the state in prescribing regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society, or as exactions for special privileges or licenses granted. The exactions of moneys under the police power are generally for the purposes of regulating the relative rights, privileges, and duties between individuals, the conservation of order, the encouragement of industry, and the discouragement of pernicious employments. 2 Cooley, Taxation (3d ed.) 1125, 1126. The exactions of moneys under the taxing power are generally for the purposes of revenue. Id. Such distinction should be observed in con-

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sidering the nature of the exactions in question from railroad companies. Where a railway runs through a state or a considerable portion thereof, its value includes not only its roadbed, depot grounds, rolling stock, and right of way, but its franchises and its corporate rights to operate the same; and hence its value for the purposes of taxation can be most satisfactorily ascertained by regarding the whole railway as a unit. 1 Cooley, Taxation (3d ed.) 693–700. This seems to be expressly held in *Chicago & N. W. R. Co. v. State, post,* p. 553, 108 N. W. 557. It is very obvious that it would be very difficult, if not impossible, to ascertain such value through town, city, and municipal agencies, since the small section of the railroad located in any town, city, or municipality, by itself, would be of little or no value, but as constituting a part of the whole line would be of great value. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554, 560, 562, 51 N. W. 1004, and cases there cited. In the language of my brother MARSHALL in the *ad valorem* case cited: "It is the logical basis of the numerous decisions holding it to be necessary to justice and uniformity of rule in taxing laws that the property of a railway corporation be *assessed as a unit;* the physical things being regarded as merged in that produced by union with the franchise element as the one of primary importance"—citing numerous cases in support of the statement.

Seemingly inspired by such necessity, the legislature of 1854 devised a system of assessing such railway property as a unit, and fixing the amount which each corporation was required to pay at a certain per centum of its gross earnings. Ch. 74, Laws of 1854. That chapter is entitled "An act taxing railroads and plank roads." The first section of the act required every railroad or plank road company to make out and return to the state treasurer, on or before January 10th of each year, a true and just verified statement of its

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"gross earnings . . . for the preceding year up to the 1st day of January." The second section declared:

"It shall be the duty of the said railroad companies and plank road companies to pay or cause to be paid to the treasurer of the state for the use of the state, on or before the 10th day of January in each year, *a sum equal to one per centum of the gross earnings of their respective roads so returned, which amount of tax shall take the place and be in full of all* of the taxes of every name and kind upon said roads, or other property belonging to said companies, or the stock held by individuals therein, and it shall not be lawful to levy or assess thereupon any other or further assessment or tax for any purpose whatsoever."

That was followed by a provision applicable when the road was partly in this state and partly in another. Secs. 3 and 4 of that chapter prescribed penalties for failure "to comply with the requirements" of the act. Sec. 5 of the act made it the duty of the treasurer of the state to

"ascertain, as near as may be, the gross earnings of such delinquent company, and assess thereupon the said one per centum, and shall seize and lay upon the whole or any part of the property, rights, and franchises of said company, and after giving ten days' public notice of the time and place of sale, shall proceed to sell at public auction the same, to satisfy the amount thereof, together with all costs and disbursements . . . incurred in making such assessments and sale thereof."

That act went into effect April 10, 1854. It appears upon its face to have been for the sole purpose of raising and collecting public revenue "for the use of the state." This is conceded in the opinion filed. There was nothing in the act regulating or attempting to regulate such roads in any way. It certainly was not a police regulation. It was purely a revenue measure, and hence, as indicated, a method of levying, assessing, and collecting taxes from such companies, "which amount of tax" was to "take the place and be in full of all of the taxes of every name and kind upon said roads;"

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and it was therein declared not to "be lawful to levy or assess thereupon *any other or further assessment or tax* for any purpose whatsoever." Such prohibition against such levy or assessment thereupon of "any other or further assessment or tax" was in effect declaring that the exaction made by the act itself was the assessment and levy of taxes. Except as to a slight change as to the time for making the return to the state treasurer, such statutes continued in force until 1860. Secs. 182–186, ch. 18, R. S. 1858; ch. 140, Laws of 1859.

Notwithstanding the plain language employed and the express purpose of the act, it is now said that ch. 74, Laws of 1854, did not impose a tax on railroad property, nor a tax at all, within the meaning of sec. 1, art. VIII, of the constitution; and this seems to be put upon the ground that this court so held more than fifty years ago, and that such ruling was thereafter repeatedly sanctioned. The case referred to is known as the *Waukesha Case,* and was decided by this court November 17, 1855. The action was by the railway company to restrain the local authorities from collecting taxes assessed in the ordinary way during the year 1854 upon the roadbed, depot grounds, and fixtures in the town of Eagle, on the ground that such property was expressly exempted by ch. 74, Laws of 1854. The defendants demurred to the bill, principally on the ground that the act was unconstitutional. In overruling the demurrer Judge HUBBELL, before whom the cause was tried at the circuit, in his written opinion, after stating the substance of the act above quoted, uses this significant language:

"The defendants contend that under the law in question the rule of taxation is not uniform: (1) Because it establishes a rule of taxation for property belonging to companies mentioned, differing from the general rule applicable to the taxation of other property; it being a tax upon *income,* instead of a ratable tax upon *value.* (2) Because it levies a state tax, and exempts from town, county, and district taxes. (3) Because it establishes a new mode of levying taxes, dif-

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fering from the general rule. . . . I am compelled to dissent from all the positions taken by the defendants." 9 Wis. 434.

The plain meaning of this language is that the act in question was not in violation of the constitutional rule of uniformity by exacting "a tax upon income, instead of a ratable tax upon value," nor because it "levies a state tax, and exempts from town, county, and district taxes," nor "because it establishes a new mode of levying taxes differing from the general rule." The whole scope of the opinion is to the effect that such "tax upon income" was not in violation of the constitutional rule of uniformity. Among other things he says, in effect, that the act "operates as a *partial* exemption from general taxation." 9 Wis. 433–436. True, as stated in the opinion filed, he said: "I regard the payment to the state, not as a tax, but as a *bonus* or *compensation* for the exemptions granted." But he said in the same connection that "the whole substance and effect of the law is to release those companies absolutely from all ordinary taxes for ordinary purposes, upon condition of an annual payment to the state." He then answered the contention of the defendants, that the rule of uniformity was violated because "the amount of such tax" was "regulated by the amount of annual income," instead of the "value" fixed by the "assessors," by saying:

"But all railroad and plank road companies in the state are made subject to the same rule. It is doubtless a departure from the general law, and amounts to a declaration that this class of property shall have a rule by itself. . . . I have never found a judicial decision holding that, because one class of property paid one rate of duty and another class a different rate, the duties were not uniform. . . . So long as each class of property in every part of the state and under like circumstances is subjected to the same rule, it is difficult to see how the principle of the constitution is violated; much less how the law is so grossly and palpably wrong as to warrant the interference of the courts, declaring it absolutely void. . . . Under every view which I have been able to take

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of this case, I cannot but regard the act of April 1, 1854 (whether its provisions be wise and equal, or otherwise), *as within the constitutional power of the legislature,* and therefore *valid.*" 9 Wis. 435, 436.

I find no statement nor intimation in that opinion tending to support the proposition now advanced that the exactions prescribed by ch. 74, Laws of 1854, were not to be enforced as taxes levied upon property within the meaning of the constitutional provision quoted. That opinion was published in 3 Am. Law Reg. (May, 1855) 679–683. The syllabus recites the constitutional provision quoted and the substance of the act mentioned, and also the ruling of the court as follows:

"*Held,* that this act was not unconstitutional, though the annual assessment on railroad companies was to be on income, instead of on property as in other cases, and though the companies were exempted thereby from town, county, and district taxes."

Judge HUBBELL was an able and learned lawyer and had previously been a member of this court under the old organization. The appeal from the order overruling the demurrer was argued for six days in this court in July, 1855; but the case was not decided until November 17, 1855, when, as appears from the record of this court, the "order of the court below overruling [the] demurrer to the bill [was] affirmed, with costs." The writing of the opinion in the case fell to the lot of Mr. Justice SMITH, who was then the reporter of the court, and continued to be such reporter not only during the balance of his term, but for a year thereafter. Had the case been reported in its order it would have appeared in vol. 4 of Wisconsin Reports; but it was never reported until Justice SMITH ceased to be a member of the court, and then only as a note to the *Knowlton Case,* in 9 Wis. 431–449. But no opinion of the court was ever prepared by Justice SMITH, nor by any one, notwithstanding the fact that the papers in

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the case were apparently retained for that purpose until February 4, 1857, when they were transmitted to the trial court. 9 Wis. 428. Had an opinion been prepared by Justice SMITH, as contemplated at the time the case was decided, yet it could not have been filed as the opinion of the court until concurred in by Chief Justice WHITON and Justice COLE, or one of them. Four years after that decision, and after Justice SMITH ceased to be a member of the court, Justice COLE, in his dissenting opinion in the *Knowlton Case,* said:

"Though no opinion has been prepared, yet the points decided were written out by one of the members of the court, and, as he informs me, placed upon file with the papers in the case. It appears that the paper containing these points has been misplaced, or cannot now be found. Still I supposed the ground of that decision was well understood throughout the state." 9 Wis. 428.

Obviously Justice COLE did not know, until so informed by Justice SMITH, that such paper had been "placed upon file with the papers in the case," and there is no evidence that Chief Justice WHITON ever knew such to be the fact. In reporting the case Justice SMITH fails to state that such paper had been placed upon file. All he said in respect to that statement is this:

"The following *paper* contains all the opinion of the court which has been written, . . . and which *has been discovered since* the opinions in *Knowlton v. Supervisors of Rock Co.* were written."

The omitted words relate wholly to the order of affirmance, which was so of record in this court and hence open to inspection.

In writing the opinion of this court in the *Knowlton Case,* DIXON, C. J., speaking of the *Waukesha Case,* 9 Wis. 431, said: "Upon examination of the records and files of the court in that case, we can find neither headnote nor opinion. As a matter of fact, we are told that none were ever written."

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9 Wis. 424. Subsequently the same chief justice stated that the statement of points there published was obtained "from one of the attorneys in the" *Waukesha Case* and "inserted by the reporter." 15 Wis. 467, 468. In Justice COLE's dissenting opinion in that case he said, among other things:

"This court did not decide, as has been intimated, that the law of 1854 did not impose a tax in the just and proper sense of that term, but was a payment made to the state by the several corporations to which the law applied in the nature of a bonus or compensation for the exemption granted. . . . The division of property into real, personal, and mixed, we considered a mere arbitrary division, which the legislature might or might not regard in the imposition of taxes. The legislature might adopt other classifications of property, imposing the tax upon those various classifications or kinds of property, and the rule of uniformity would be preserved, so long as the same rule of taxation was laid upon the same kind or class of property throughout the state, or the local division for which the tax was raised. For instance, the legislature might prescribe that all the railroad and plank road property in the state should pay one per centum of the gross earnings of their respective roads *in lieu of all other taxes,* as was done by the act of 1854, and yet this law would be valid, because it applied to all of that kind of property in this state. It was a uniform rule upon that class of property within the requirements of the constitution." 9 Wis. 428.

No one will question the integrity of Justice COLE, and no one would think of doubting the accuracy of his statements thus made, unless he supposed he had unmistakable evidence to the contrary. In my judgment the language of Justice SMITH, in the paper mentioned, is to the same effect as the language of Justice COLE above quoted and the language of Judge HUBBELL in deciding the case above quoted. Justice SMITH's paper declared:

"The imposition upon railroad property by the act of 1854 does not violate that provision of the constitution of Wisconsin which provides a uniform rule of taxation, *provided* like property pertaining to railroads, or all property of that class,

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is alike taxed, or alike exempt, as it appears to be. . . . The state having exempted this class of property from any tax whatever (*except the one per cent.*), which it had the right to do, *provided* it exempted all property of the same class uniformly, cannot be permitted to repudiate its own act and demand a levy under the general law, from the operation of which it had granted the exemption." 9 Wis. 449.

The plain meaning of this language is that ch. 74, Laws of 1854, did not violate the rule of uniformity because it prescribed a different method of taxing railroad property from other property, since it "alike taxed or alike exempted" all property of that class, and that by the act in question the state had the right to exempt from taxation all that class of property, except "a sum equal to one per centum of the gross earnings" of the respective roads, since the act exempted all property of the same class. In other words, it re-affirmed the ruling of Judge HUBBELL in that case, to the effect that railroad property could be classified for the purposes of taxation "so long as each class of property in every part of the state and under like circumstances is subjected to the same rule," and hence that railroad property could be classified by itself without violating the rule of uniformity. That was intended to answer the contention of Mr. Ryan to the contrary under the second head of his brief. 9 Wis. 439–444.

Having thus solemnly held, in effect, that under the constitution the legislature had power to prescribe the property upon which taxes should be levied and to classify such property for the purposes of taxation, and to put all railway property into a class by itself, and to enforce payment of exactions made on account of the same in the manner prescribed, it is difficult to understand how the same court in the same action could consistently hold that ch. 74, Laws of 1854, did not provide for imposing "a tax on railroad property, or a tax at all, within the meaning of sec. 1, art. VIII, of the constitution." Certainly no such inconsistency should be attributed to the decision of November 17, 1855, unless the

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evidence is unquestionable. I find no such evidence in Justice SMITH's paper. The balance of that paper not quoted above reads as follows:

"If the act of 1854, having relation to this class of property, was not passed in a constitutional manner, as it is claimed appears by the *records or journals of the legislature,* so, by like evidence, it would seem that the law by which the board of supervisors attempted to assess this property was unconstitutionally passed; and, admitting the premises, the injunction is proper, the bill covering such a case. But the court do not think *the law of 1854* does *impose* a tax within the meaning of the constitutional *provisions,* and therefore the law of 1854 is valid, so far, at least, as the government is concerned." 9 Wis. 449.

Manifestly, the first portion of this quotation has no reference to the rule of uniformity prescribed by sec. 1, art. VIII, of the constitution, but relates entirely to the first point made in the brief of Mr. Ryan, to the effect that ch. 74, Laws of 1854, was a "law which imposed a tax," but was not passed by a yea and nay vote entered upon the journals of the legislature, as prescribed by sec. 8, art. VIII, of the constitution. 9 Wis. 436–439. According to the paper the court assumed that if it so appeared "by the records or journals of the legislature," as claimed by Mr. Ryan in support of his demurrer, then it also appeared "by like evidence . . . that the law by which the board of supervisors attempted to assess this property was unconstitutionally passed," and hence no justification to the defendants. The only possible ground for an inference in support of the proposition advanced is the use of the word "provisions" in the next clause of the quotation, or rather the use of the letter "s" at the end of that word, making it plural instead of singular. The language of that clause is significant. The word "but," at the beginning, indicates a continuance of the answer to Mr. Ryan's contention that the act mentioned was never passed by a yea and nay vote entered upon the jour-

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nals, as required by sec. 8, art. VIII, of the constitution; and the words *"the law of 1854 does impose a tax"* relate to what is said in that section, and not to anything said in sec. 1, art. VIII, of the constitution. That had been fully covered in the other portion of Justice SMITH's paper above quoted. Certainly, there is a broad distinction between a law imposing a tax and a statute prescribing a method of levying a tax upon property, or making an exaction in lieu of a tax on property.

In view of the language of that paper, and the facts stated, and what was said by Justice COLE, it is very clear to my mind that this court, in the case referred to, decided four propositions November 17, 1855, to the effect: (1) Ch. 74, Laws of 1854, did not impose a tax within the meaning of sec. 8, art. VIII, of the constitution, which required the vote thereon to be taken by yeas and nays and entered on the journal. (2) If it did, it also appeared by like evidence that the statute under which a general assessment of this same property was assessed by the defendants was not passed by such yea and nay vote, and hence was no justification for the defendants. (3) Under sec. 1, art. VIII, of the constitution, the legislature had the power to prescribe the property upon which taxes should be levied, and to classify such property for the purposes of taxation, and to put all railway property in a class by itself, and to enforce payment of exactions made in the manner prescribed in the act mentioned. (4) That act did not violate the rule of uniformity by prescribing a different method and rate of taxing railroad property from other property, since the exaction in lieu of taxation and the exemption therein made applied alike to all that class of property throughout the state.

The question recurs whether such power to classify property for the purposes of taxation and to make exactions in lieu of taxation has since been permanently negatived by the decisions of this court. It must be admitted that November 9,

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1859, and several months after Chief Justice WHITON and Justice SMITH had ceased to be members of this court, and against the judgment of Justice COLE, this court, in an opinion written by Chief Justice DIXON, concurred in by Justice PAINE, constituting a majority, brushed aside the decision of November 17, 1855, with the remarks that "upon examination" they found "neither headnote nor opinion" among "the records and files of the court in that case," and had been "told that none were ever written," and that "from the best information" they had obtained they had learned "that it was determined by the court that no question of the exercise of the taxing power was involved in it." *Knowlton v. Rock Co.* 9 Wis. 410, 424. In that case the opinion of the court (with Justice COLE dissenting) declared that sec. 1, art. VIII, of the constitution prohibited the legislature from classifying property for the purposes of taxation and then taxing one class at a different rate than another class. Among other things it is there said:

"'The rule of taxation shall be uniform;' that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform. It shall in all cases be alike. The act of levying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and, in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform." 9 Wis. 420, 421.

January 4, 1860, two cases were decided by this court in which that case was approved so far as deemed applicable, both relating to special assessments, which were held to be an exercise of the taxing power and limited by sec. 1, art. VIII, of the constitution, as modified by sec. 3, art. XI, of the constitution. *Weeks v. Milwaukee,* 10 Wis. 242, 270 (see p. 262); *Lumsden v. Cross,* 10 Wis. 282, 289 (see p. 284). In this last case it was expressly held that "all taxes levied for the purpose of revenue and for the support of the gov-

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ernment, as well for the expenses of municipal corporations as for the state at large, must be levied in accordance with the uniform rule prescribed by sec. 1, art. VIII, of the constitution."

The case of *State ex rel. Att'y Gen. v. Winnebago L. & F. R. P. R. Co.* 11 Wis. 35, came before this court on the return to the alternative writ of *mandamus* to compel the plank road company to pay to the treasurer of the state $70,000, being a sum equal to one per centum of its gross earnings for two years, and which it had failed and neglected to make return to the state treasurer and pay, as required by law. Ch. 74, Laws of 1854; secs. 182, 183, ch. 18, R. S. 1858. The company moved to quash the writ on the sole ground that the statutes cited were in violation of the constitutional provision which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Sec. 1, art. VIII. The case presented for consideration the same questions involved in the case decided November 17, 1855. Both cases arose under the same statutes, the only difference being that the former action was brought by the railway company and the latter action was against the plank road company. The opinion of the majority of the court was written by Justice PAINE, and, as his opinions usually were, in language too plain to be misunderstood. After speaking of the uncertainty of the points decided in the *Waukesha Case,* 9 Wis. 431, and that it was "common for all courts to review their own decisions," he declared that, "in view of its peculiar circumstances," he deemed it "eminently proper [for that case] to be *reconsidered.*" He then said that if it was decided in that case "that the law taxing rail and plank road companies" was "a compliance with the constitutional requirement of a uniform rule, it was in this respect overruled by" the *Knowlton Case.* Then, after reconsidering and rediscussing the question, the majority of the court, adhering to the rule as stated in the *Knowlton Case,*

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held that the legislature had no power to divide property into different classes, preserving equality in each class though fixing a different rate in the different classes, but that, on the contrary, the rule of taxation must be general, and applicable to all taxable property alike, and that the rule of uniformity "was designed to secure equality in the burden as between the different kinds of taxable property." 11 Wis. 35, 38–42. The opinion then states that "the only remaining question is whether the imposition upon the plank road company is a tax within the meaning of the constitution." 11 Wis. 42. It then answers the several attempts of counsel to distinguish it from a tax, to the effect that, although assessment on valuation was the usual and general mode of imposing a tax, yet that it was not essential; that the "difference in the mode would not prevent its being a tax;" that there was "certainly no room for the pretense that this is [was] a *bonus* for the granting of the charter;" that there was no ground for claiming "that the *bonus* was a mere proposal or offer of a bargain or contract," since "the tax was absolute and imperative, leaving nothing to the discretion of the taxpayer." It is then said, in effect, that the exaction cannot be maintained as a license, which is an "authority granted to do that which the licensee might not legally do without it." The opinion continues:

"We have no idea that the provision of the constitution requiring the rule of taxation to be uniform was designed to, or does, impose any restriction on the police power of the legislature in granting licenses for anything that may in its nature be the subject matter of a license. But we do not think they could license the owners of a particular class of property to be exempt from the payment of full taxes on the payment of a less sum. That would obviously be no exercise of the police power, but could only be resorted to as a mere evasion of the constitutional rule of uniformity, and that is the only kind of a license into which this act *taxing rail or plank roads* can by any possibility be construed. It is not a license to exercise the rights granted by their charters, for that right the charters themselves give, and this act does not profess to

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give. It grants only the right to be exempt from all other taxation on the payment of a specific tax of one per centum of their gross earnings. The legislature did not call this a license, but honestly called it a tax, *as it is beyond all question.*" 11 Wis. 45.

Justice COLE dissented from the proposition that the legislature had no power to classify property for the purposes of taxation, and then to tax one class at a different rate than another; but he never dissented from the proposition that the exaction of a sum equal to one per centum of the gross earnings of rail and plank road companies was a tax within the meaning of the uniformity clause of the constitution. On the contrary, he always contended that it was a tax, and a valid tax, on all that class of property. So it appears that March 6, 1860, this court in that decision unanimously held that such exaction upon such gross receipts was a tax on the property of such companies, within the meaning of sec. 1, art. VIII, of the constitution—a proposition which does not seem to find favor at the present time.

Sixteen days after the announcement of that decision, and on March 22, 1860, the governor of this state approved of two bills which had just before passed the legislature. One was entitled "An act exempting certain property therein named from taxation," and declared:

"The track, right of way, depot grounds, and buildings, machine shops, rolling stock, and all other property, necessarily used in operating any railroad in this state, belonging to any railroad company, are hereby, all and singular, declared to be, and they shall henceforth remain, *exempt from taxation,* for any purpose whatever, and it shall not be lawful to assess or impose taxes upon any property before named." Ch. 173, Laws of 1860.

Such exemption was subject to a proviso as to special assessments and taxes on property not connected with such roads, and excepting therefrom railroads operated by horse

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power. The other was entitled "An act regulating railroads." The first section declared:

"All railroad companies now organized, or that may hereafter be organized, in this state, and having a railroad completed, in whole, or in part, and being operated or used, shall hereafter be compelled to apply for, and obtain, in the manner hereinafter directed, a license for the operating of their respective roads, and to pay for such license, to the treasurer of the state, as a fee or charge therefor, a sum equal to one per centum of the gross earnings of their respective roads." Ch. 174, Laws of 1860.

Secs. 2 and 4 fixed the time for making return to the state treasurer of the amount of such gross earnings, and applying for such license and paying for the same, substantially as prescribed in secs. 182, 183, ch. 18, R. S. 1858, as amended by ch. 140, Laws of 1859, omitting therefrom plank road companies. Sec. 3 prescribed a penalty and forfeiture for any failure to comply with the act, with a proviso. Sec. 5 repealed secs. 183, 186, ch. 18, R. S. 1858; and sec. 6 excepted from the act railroads operated by horse power.

These two acts were not only pending at the same time and approved by the governor on the same day, but they appear on their face to have one common purpose, as complements of each other. With some change of phraseology and omitting the provisions in respect to plank roads, they were, together, in substance the same as the prior statutes above considered (ch. 74, Laws of 1854; secs. 182–186, ch. 18, R. S. 1858). Horse railroads are expressly excepted from each, and neither applied to plank road companies. The one exempts from taxation such property of the railway companies as is used in operating the respective railroads for which the license is granted, leaving all lands owned by such companies, not adjoining the track, subject to all ordinary taxes. The sole purpose of the two acts together was to secure from the respective railroad companies, each year, "a sum equal

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to one per centum of the gross earnings of such road." While the one was entitled "An act regulating railroads," yet it contained no regulation nor attempt at regulation. The only object of the two enactments was to secure for the use of the state the revenue mentioned. The exaction of such percentage of the gross earnings of the property so exempted, though in form "as a fee or charge" to be paid "for a license for the operating of their respective roads," was nevertheless essentially an annual tax on the respective companies for the amount stated, in consideration of such exemptions. While that act was, undoubtedly, inspired by previous rulings of this court, yet it is true that sixteen days before that enactment Justice PAINE, with DIXON, C. J., concurring, declared, in the language above more fully quoted, that such exaction by way of license issued under the circumstances mentioned "could only be resorted to as a mere evasion of the constitutional rule of uniformity." 11 Wis. 45.

The *Kneeland Case* was decided after that enactment, but was based upon facts existing prior to the enactment. It was brought to restrain the issuing of tax deeds on Kneeland's property, which had been sold for taxes for the years 1858–59, on the ground that the assessors had knowingly and intentionally omitted to assess the property of railroad companies of the value of $500,000. The city justified such omission under ch. 74, Laws of 1854, and sec. 183, ch. 18, R. S. 1858, and the trial court held in favor of the city and dismissed the complaint, and Kneeland appealed to this court; and upon the first hearing the judgment was reversed and the cause remanded with direction to enter judgment in favor of the plaintiff. 15 Wis. 454–466. In writing the opinion of this court, in reaching such conclusion, Justice PAINE starts out with the statement that in the case of *State ex rel. Att'y Gen. v. Winnebago L. & F. R. P. R. Co.* 11 Wis. 35, "this court decided that the law which attempted to make railroads and plank roads *taxable by a different rule* from

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that applicable to the general mass of taxable property was unconstitutional." This was said on the theory that the exactions made from such companies by the statutes just cited were necessarily taxes upon property within the meaning of sec. 1, art. VIII, of the constitution, and there is no intimation in that opinion that such exactions were not such taxes. 15 Wis. 458–466. The only hesitancy expressed in holding the act, so taxing railroads by a different rule than other property, to be invalid, was the fact that in the *Waukesha Case,* 9 Wis. 431, the same act had "been once declared valid by this court." 15 Wis. 461. In view of that decision, and the fact that the departure therefrom had resulted in invalidating all the taxes in counties where railroad property was located, the court was urged to retrace its steps and "hold the law taxing railroads to have been constitutional." 15 Wis. 462. But the court finally concluded "that the consequences of going *backward*" might, "after all, be more disastrous than those of going forward." The opinion then states the point at issue and the result of going backward in this unmistakable language:

"But, if we go backward, we must say that particular classes of property may be taxed at less rates than others, and that the legislature may make whatever discrimination they please in the rates of taxation, provided only that each class is taxed alike." 15 Wis. 463.

On a motion for a rehearing being made the same was granted, and opinions filed thereon by DIXON, C. J., and Justice PAINE. 15 Wis. 467–474. The gravity of the situation sufficiently appears in those opinions. Among other things, DIXON, C. J., said:

"The interests involved are immense, and the consequences of adhering to our late decision beyond calculation. The taxes for a series of years in a great state like this cannot be annulled, and every proceeding connected with and depending upon them overturned, without a shock which must be felt by every property owner and citizen of the state." 15 Wis.

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468. "I do not see how the errors of the past are to be corrected, except by the levy of a new tax to make up all former deficiencies. I have tried to persuade myself that a reassessment and relevy of the taxes for those years was practicable, *but I am satisfied it is not.*" 15 Wis. 469. "It seems to me that, as to the particular species of property in question before the court in 1855, I must return to the rule then established." 15 Wis. 469. "As I have before said, my mind is in great perplexity and doubt, but upon the whole I can see no other way than to go back to the rule established by the court in 1855." 15 Wis. 471.

The opinion of Justice PAINE on that motion is equally significant. Among other things he said:

"I have become satisfied that, if we adhere to the decision already announced in this case, it will invalidate not only the taxes in those counties where there was rail and plank road property, but also the entire taxes of the state; for the omission of that property in the counties where it was located necessarily disturbs the proportions as between them and the other counties in the state equalization. Another case has also been argued, in which it was claimed that the principles of our decision must also *invalidate the laws of 1860,* professing to exempt railroads entirely, and then requiring them to pay a license. It is said that this is in substance the same thing as the law of 1854 under another name. *And I am satisfied also that this is so.* We cannot, while adhering to our 1860, unless we are prepared to say that the legislature may decision in the" *Plank Road Case,* "sustain this legislation of do that indirectly which it cannot do directly; that it may, by merely calling things by wrong names, sustain the most palpable evasion of a constitutional provision." 15 Wis. 472.

Then, after reiterating his conviction "that a rule taxing different kinds of property at different rates is not a uniform rule," he declared it to be his "duty to return to and follow, though" he could not defend, the *Waukesha Case,* 9 Wis. 431; that, notwithstanding the uncertainty as to the decision in that case, it was known "that upon some ground" the court "sustained the law of 1854," and "that all the taxation of the state and all the private transactions growing out of it"

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had "since been conducted on the theory of its validity," and hence that that decision should be regarded as imperative authority and the decision in the *Plank Road Case,* 11 Wis. 35, overruled. 15 Wis. 473, 474. After the case had been reargued Justice PAINE wrote another opinion on behalf of the court, and in doing so stated that ordinarily he would content himself "without adding anything to the opinions" he had "already filed in the case," but in view of the fact that "the positive conviction, stated in granting" the rehearing, that it was the duty of the court to retrace its steps and follow the *Waukesha Case,* had "been assailed by eminent counsel," he briefly stated the reasons for adhering to such convictions. 15 Wis. 692. The opinion then discusses at some length the maxim *stare decisis* on the assumption "that there was a decision of this court sustaining the validity of the law of 1854 *taxing rail and plank roads.*" 15 Wis. 692, 695. The opinion then answered the contention that no such assumption could be indulged, "based entirely upon the fact that no written opinion was filed in the *Waukesha Case* as the statute required." The opinion then states that Justices SMITH and COLE

"both agree that the court decided that the act of 1854 was not a violation of the constitution. We get this from a written statement of the points decided, made soon after the decision, by the judge then acting as reporter, and to whom the duty was assigned of writing the opinion, which statement was sent to one of the counsel in the case for his information; and from the statements of Mr. Justice COLE, now on the bench. . . . The only discrepancy is that the statement of Justice SMITH shows that the court did not think that the law of 1854 imposed 'a tax within the meaning of the constitutional provisions,' while Justice COLE states that they did 'not decide that it did not impose a tax,' etc. But the difference is wholly immaterial, inasmuch as both statements show the court held that, even if it was a tax, it was no violation of the rule of uniformity. Both show that the law was decided to be no violation of the constitution." 15 Wis. 695.

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DIXON, C. J., had already stated "that no opinion or statement of the points decided . . . was ever placed upon the files of this court," but that such statement "was afterwards obtained . . . from one of the attorneys in the former case and inserted by the reporter." 15 Wis. 467.

Obviously, neither DIXON, C. J., nor Justice PAINE had much faith in the claim based upon the word "provisions," contained in one clause of the statement, to the effect that the act of 1854 did not impose a tax on property, within the meaning of the uniformity clause of the constitution, especially against the statement of Justice COLE, above quoted, that no such decision was made. This is manifest from the fact that each of the several opinions of Judges DIXON and PAINE, mentioned, was made to turn upon the power of the legislature to classify property for the purposes of taxation and then to tax each class at a different rate. Thus, Justice PAINE in the *Kneeland Case* said in behalf of the court:

"But, if we go backward, we must say that particular classes of property may be taxed at less rates than others, and that the legislature may make whatever discrimination they please in the rates of taxation, provided only that each class is taxed alike." 15 Wis. 463.

Since the court did "go backward" and affirm the judgment, instead of reversing it, the court necessarily sanctioned the legislative power of classification and discrimination so far as taxing rail or plank roads was concerned. Certainly Justice PAINE did not intend to go back to an assertion of Justice SMITH which he deemed "wholly immaterial." That is made plain in another case in the same volume, where this court refused to overrule the *Knowlton Case,* but expressed itself as being bound by the decision in the *Waukesha Case,* and then declared: "But we shall follow that decision no further than the exact point decided; that is, to sustain the validity of the act of 1854 *taxing rail or plank roads.*" *Knowlton v. Rock Co.* 15 Wis. 600, 601.

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The ruling in the *Kneeland Case* "as to the constitutionality of the law *taxing railroad companies a per cent.* upon their gross earnings" was affirmed in *Dean v. Gleason,* 16 Wis. 1. The history of such adjudications was partially stated in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 64–77. As stated by Justice PAINE in the *Kneeland Case,* "the laws of 1860" (chs. 173, 174, Laws of 1860) "professing to exempt railroads entirely, and then requiring them to pay a license," were "in substance the same thing as the law of 1854 under another name." As already indicated, those two chapters together constituted a single plan or scheme for taxing railroads. With some slight changes, increasing the percentage and otherwise, they were continued in the Revisions of 1878 and 1898, and down to the *ad valorem* enactment. This is, in effect, conceded in the opinion filed. True, the substance of ch. 173, Laws of 1860, was placed in the section exempting property from taxation (subd. 14, sec. 1038, R. S. 1878, and Stats. 1898); and the substances of ch. 174, Laws of 1860, exacting a percentage on gross earnings, were placed in the chapter on the "Taxation of Railroads" (secs. 1211–1214, R. S. 1878, and Stats. 1898). But, nevertheless, the two chapters are still to be regarded as together constituting the same scheme or plan for taxing railroads. They were complements of each other, and no legislature would grant the exemption without some exaction. Thus it was held by this court, in an opinion written by DIXON, C. J., that "the payment of this sum into the state treasury, and which is called license money, must, in the light of past legislation upon the subject, be regarded as, in the judgment of the legislature, an equivalent for the taxes which those companies would otherwise be required to pay, if assessed and taxed according to the ordinary method prescribed by law." *Milwaukee & St. P. R. Co. v. Crawford Co.* 29 Wis. 116, 123, 124; *Milwaukee & St. P. R. Co. v. Milwaukee,* 34 Wis. 271, 277, 278. In this last case it was held that "the statute is to be fairly and

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liberally construed in favor of the railroad companies, which do not receive such exemptions as a bonus, but are required to pay into the state treasury an equivalent for taxes in the shape of a license." In a later case, construing the sections of the Statutes last cited, it was held that "statutes imposing license fees, which are to all intents and purposes taxes, should be governed by the same rules of construction as those imposing taxes *eo nomine.*" *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 140, 24 N. W. 140. The court there said: The statutes "impose involuntary burdens for revenue purposes upon those who operate railroads. These impositions are called license fees, but in their objects and effects they are in the nature of taxes. Manifestly, the same rules which prevail in the construction of statutes imposing taxes *eo nomine* should be applied to statutes imposing such license fees."

In view of the adjudications of this court above cited, I would not feel at liberty to hold that the legislature had no power to place railroad property in a class by itself for the purposes of taxation and to tax the same at a different rate and by a different method than other property, even were I to concede, as an original proposition, the correctness of the ruling in the *Knowlton Case* and the *Plank Road Case*—much less to hold that a tax upon the gross earnings of railway companies was not a tax on property within the meaning of the uniformity clause of the constitution. But I do not concede such rulings to have been correct. In an opinion written more than a quarter of a century ago, concurred in by Chief Justice COLE and Justices LYON and TAYLOR, the writer pointed out the fact that the uniformity clause of our constitution did not contain the word "equal" or "value," or the equivalent of either of those words, like other constitutions cited. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 60–88, 8 N. W. 821; *Bacon v. Board of State Tax Comm'rs,* 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 361, 363, note. And so the conclusion was there reached that, in the absence of

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such restrictive words in that clause of our constitution, the words "the rule of taxation shall be uniform" should not be construed as including the word "equality" or "value," or the equivalent of either. And so it was there said that that clause in our constitution

"simply requires that 'the rule of taxation shall be uniform.' But who makes the rule which is thus to be uniform? Was it made by the constitutional convention, or was it left for the legislature? Most of the constitutions referred to, where the word 'uniform' has been used, have directly or indirectly applied it to property named therein, or valuation, or rate, or taxes, or classes of subjects; but in our constitution it applies to none of those things, but simply to the '*rule* of taxation.' What is this rule of taxation? Manifestly, it is the act of levying a tax, or imposing taxes, on the subjects of the state by the legislative power of the state. It is the measure of individual duty in support of the public burdens, and the means of enforcing the same. The rule of taxation is the law of taxation. Such rule or law must be prescribed by the legislature, as well as the property to which it is to be made applicable. But the uniformity does not go directly to the property so prescribed, but only to the 'rule' or law by which contributions are enforced against the owners of such property. The uniformity reaches the property so designated by the legislature, but only through the 'rule' or law prescribed. As the uniformity could through the rule or law only reach such property as the legislature should designate as being subject to taxation, it is very evident that it never could reach property not so designated, and therefore exempt from taxation, and hence to which the rule could not apply. The legislature has the exclusive power to designate the property which shall be subject to taxation, and to prescribe a rule or law by which the owners of such property are forced to contribute to the public burdens, limited only by the requirement that the rule so prescribed shall be uniform. Uniformity of rule is entirely different from uniformity of subjects to which the rule is applicable. Most general laws are uniform rules, but the diversities in the subjects to which they apply are innumerable. In determining just what the rule of uniformity shall be in taxation, and how it shall be applied, there is a wide

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field for legislative discretion. Of course, it could be applied to rate or valuation, or mode or manner of assessment or collection, or all exemptions might be repealed or greatly modified; and so it could be applied to all property, or to certain subjects, or to certain classes, kinds, or species of property. The denial of the power of the legislature to determine and fix 'the rule of taxation,' subject to the limitation of uniformity, and the attempt to engraft it upon the constitution itself, as had been done by apt words in other constitutions, has led to much diversity of opinion, if not confusion of terms." 52 Wis. 93, 94.

This certainly was in conflict with the conclusion reached in the *Knowlton Case* and the *Plank Road Case,* where, although it was conceded to apply to the "course or mode of proceeding in levying or laying taxes," yet it was also said that such

"course or mode of proceeding . . . shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and, in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform. The rate must be uniform. Thus uniformity in such a proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality, or local subdivision of the government, within and for which the tax is to be raised." 9 Wis. 420, 421.

If the construction thus given to the clause of the constitution in question is now to prevail, if "the course or mode of proceeding in levying and laying taxes" must "in all cases be alike," if the "several distinct steps" in such proceedings "must be uniform," then I am unable to perceive upon what principle the validity of ch. 315, Laws of 1903, can be sustained, since it provides only "for the taxation of railroad companies," with a different method of assessment and a different method of valuation and fixing the rate than of other

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property, and other differences unnecessary to mention. But, as I read the decisions of this court, such construction so announced in the *Knowlton Case* and sanctioned in the *Plank Road Case* was expressly departed from in the final adjudication in the *Kneeland Case,* and subsequently. Thus it was held long ago that "the mode of levying, assessing, and collecting taxes is entirely subject to the discretion of the legislature, limited by the constitutional provision which requires the rule of taxation to be uniform." *Smith v. Cleveland,* 17 Wis. 556, 565. Chief Justice DIXON, speaking for the court, there said:

"The machinery of taxation, the mode of levying, assessing, and collecting, is subject entirely to its discretion. The liability to taxation and nonpayment of the taxes being admitted, the legislature may, as to all other things, declare what shall or shall not be essential to the validity of the proceedings. The same power which imposes a duty may dispense with its performance."

So the court held, in an opinion by the same chief justice, that "the legislature has power to prescribe the forms of tax proceedings, and in matters of form may declare what steps shall or shall not be essential to the validity of a tax sale or tax deed." *Smith v. Smith,* 19 Wis. 615. But it is unnecessary to further cite authorities on that question, since it is expressly held in the *ad valorem* case decided herewith that it "is within the legislative discretion to place railway corporations in a class by themselves," as is done by the act in question. Not only that, but it is there expressly held that "the classification of mortgage indebtedness is legitimate under the doctrine of classification" therein stated. So it is held in that case that "the legislature may classify and subclassify property, to the extent of distinguishing differences as to a particular class or subclass, reasonably requiring special treatment to promote the constitutional requirement." The placing of railroad corporations in a class by themselves for the

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purposes of taxation was just as legitimate under the license system as under the *ad valorem* system. See *Chicago & N. W. R. Co. v. State, post,* p. 553, 108 N. W. 557.

I am unable to perceive any logical basis for the proposition now advanced that the exactions made by law of "four per centum," or any other "per centum, of the gross earnings of all railroads," were not taxes upon property within the meaning of sec. 1, art. VIII, of the constitution. There can be no question but that such earnings were property. This court has recently held that notes and mortgages—"things in action and evidences of debt"—were "property" within the meaning of that clause of the constitution, and hence were subject to taxation under that clause. *Kingsley v. Merrill,* 122 Wis. 185, 190, 194, 99 N. W. 1044. Since the gross earnings of every railroad must necessarily be property belonging to such corporation, the only remaining question for consideration is whether the exactions so made in lieu or consideration of such exemption from ordinary taxation were "taxes. . . . levied upon such property" within the meaning of that clause of the constitution. In determining that question it is immaterial whether there was a contractual relation between the state and the railroad companies or not. It is conceded in the opinion filed that they were "taxes in the just and proper sense of the term," for the purposes of revenue; but it is said that they were not "taxes on property within the meaning of the constitution." Since such exactions of the percentage of such gross earnings were "taxes in the just and proper sense of the term," it is difficult to conceive why they were not taxes on property within the meaning of the constitution. Certainly no marked distinction has heretofore been pointed out. Such distinction cannot be satisfactorily made upon the theory of inclusion and exclusion. The necessity for having some fixed standard to determine such differences seems to have been realized, and so in the *ad valorem* case, herewith decided, and above cited (*post,*

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p. 553), it is, as I understand, in effect held that "the rule of uniformity" prescribed by the constitution only applies to "direct taxation on property," and that as to such property the "legislature may classify and subclassify property." The difficulty about such conclusion is that the constitution does not so read. It simply declares that "taxes shall be levied upon such property as the legislature shall prescribe" by a uniform rule. The language is sweeping and is broad enough to cover all "taxes in the just and proper sense of the term." It is not confined to "direct taxation" nor direct taxes. Even if it were, the proposition advanced could not, in my judgment, be maintained, for the simple reason that a tax upon the "gross earnings" of a railroad company is just as much a direct tax on that portion of the company's property as though it had been upon the roadbed, or rolling stock, or any personal property. Since a tax on "things in action and evidences of debt" has been held to be a tax on property within the meaning of the constitution (*Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044), it would seem to follow that a tax on gross earnings of railroad companies is a tax on property within the meaning of the same clause of the constitution. This must be so, unless such "gross earnings" are not to be regarded as property, since the mode of making such exactions for the purposes of revenue is purely a matter of legislative discretion.

But we are not without direct authority on the question. Under the constitution of the United States "direct taxes" are required to "be apportioned among the several states, . . . according to their respective numbers," or inhabitants. Sec. 2, art. I, Const. of U. S. But indirect taxes, such as "duties, imposts, and excises," are required to "be uniform throughout the United States." Sec. 8, art. I, Const. of U. S. Under such provisions it was always conceded that taxes on land were "direct taxes." After elaborate arguments and careful deliberation it was held, under such constitu-

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tional provisions, by the supreme court of the United States, that "a tax on the rents or income of real estate" was a "direct tax," and, not having been so apportioned, was void. *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 15 Sup. Ct. 673. Such rulings were affirmed on re-argument. 158 U. S. 601, 15 Sup. Ct. 912. The court in the same case then decided that "taxes on personal property or the income of personal property" were "direct taxes." Id. In a later case the same court held that "a stamp tax on a foreign bill of lading is, in substance and effect, equivalent to a tax on the articles included in that bill of lading, and therefore is a tax or duty on exports." *Fairbank v. U. S.* 181 U. S. 283, 21 Sup. Ct. 648. Since taxes on the income of real and personal property are direct taxes on property, there would seem to be no escape from the conclusion that taxes on the income of railway companies, consisting of gross earnings, are also direct taxes.

It is sought to bring the case within the rule applicable to "duties, imposts, and excises," or mere privileges, and so cases are cited where foreign insurance companies or other foreign corporations have been licensed to do business in the state. Numerous decisions of that kind have been made by that court, and no one disputes the proposition. The case apparently most relied upon is *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 12 Sup. Ct. 121. The defendant was a corporation created under the laws of Canada, having its principal place of business at Montreal. The action was brought by the state to recover "an *excise tax* upon the defendant . . . for the privilege of exercising its franchises within the state," under a statute which declared:

"Sec. 1. The buildings of every railroad corporation or association whether within or without the located right of way, and its lands and fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein.

"Sec. 2. Every corporation, person or association, operat-

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ing any railroad in this state, shall pay to the state treasurer, for the use of the state, *an annual excise tax* for the privilege of exercising its franchises in this state, which, *with the tax provided for in section one,* shall be in lieu of all taxes upon such railroad, its property and stock."

It will be observed that such *"excise tax"* was in addition to the taxes upon the property of the corporation in the towns and cities where it was located. The question for determination was whether such state statute was a regulation of interstate and foreign commerce. The trial court held that it was, and adjudged accordingly. That judgment was reversed on the ground that such statute was not a regulation of such commerce, but, in the language of the act, "an annual *excise* tax." Mr. Justice FIELD, speaking for the court, distinguished that case from an earlier case where the tax was "in terms upon the gross receipts of" the corporation. *Phila. & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118. Justices BRADLEY, HARLAN, LAMAR, and BROWN dissented on the ground that the act was a regulation of interstate commerce. It had long before been well settled by that court that the right of such Canada corporation to do business in the state of Maine depended solely upon the will of that state. *Hooper v. California,* 155 U. S. 648, 652, 15 Sup. Ct. 207, and numerous cases there cited. In this last volume that same court held that, without infringing the interstate commerce clause of the federal constitution, a state might impose taxes upon foreign corporations engaged in such commerce, "graduated according to the amount and value of the companies' property measured by miles, and being in lieu of taxes directly levied on the property," and that the same was "a tax which" was "within the power of the state to impose." *Postal Tel. C. Co. v. Adams,* 155 U. S. 688, 696–698, 15 Sup. Ct. 268. It was there said by the court that "doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or

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other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution." See, also, *Atlantic & P. Tel. Co. v. Philadelphia,* 190 U. S. 165, 23 Sup. Ct. 817. In a later case in that court, where the facts were similar to the case at bar, the local statute required the railway company to pay a "percentage on gross earnings as provided for therein," in lieu of all other taxes; and the question was whether such statute was a regulation of interstate and foreign commerce, and it was held to be taxation of the lands of the company, through the payment of such percentage, and it was said in the unanimous opinion of the court:

"But there is great force in the claim that the act is not subject to the objections mentioned in" *Fargo v. Michigan,* 121 U. S. 230, 244, 7 Sup. Ct. 857; *Philadelphia & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118, "and the cases therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes *a different method of taxation* upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of *taking a percentage upon the gross earnings* as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross

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earnings, but *was a tax upon the lands and other property of the company,* and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings." *McHenry v. Alford,* 168 U. S. 651, 670, 671, 18 Sup. Ct. 242. See *Mich. Cent. R. Co. v. Powers,* 201 U. S. 245, 26 Sup. Ct. 459.

But it is unnecessary to multiply authorities. As indicated, the license system of taxing railways, so called, which was in force in this state during the fifty years immediately preceding the present *ad valorem* system, included the exemption from taxation of "the track, right of way, depot grounds and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state, belonging to any railroad company;" and the exaction, in lieu and consideration thereof, of a "per centum of the gross earnings" of all such railroads. Subd. 14, sec. 1038, R. S. 1878, and Stats. 1898, and secs. 1211–1214 of the same Statutes. No one would claim that any legislature would grant such exemption as an independent proposition, nor without exacting payment, for the purposes of revenue, of an amount supposed to be equal to what would have been the taxes upon the property so exempted had the same been assessed in the ordinary way. This is apparent from the absence of such exemption in the *ad valorem* system (subd. 3, sec. 2, ch. 315, Laws of 1903), and its presence in the license system. The license system, so called, was manifestly resorted to by reason of the seeming necessity of taxing the property of each railway company as a unit and the difficulty of so taxing such property, as experienced in the *ad valorem* case decided herewith (*post,* p. 553).

I am willing to subscribe to the proposition that in enacting ch. 315, Laws of 1903, providing for the "taxation of railroad companies" by the *ad valorem* method, the legislature was under the limitations imposed by the uniformity clause of the constitution; but I am unwilling to subscribe to the

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proposition, now advanced, that in exacting the corresponding millions of money annually from the same companies under the license system, which so prevailed prior to that enactment, the legislature was under no limitation by reason of the uniformity clause of the constitution. The purpose of each of the two methods was to secure a corresponding amount of revenue for the use of the state. To hold that the enactment of the one method was subject to such constitutional limitation and that the enactment of the other was not is to hold that the legislature by the choice of methods may determine whether such constitutional restriction shall or shall not be operative. To so hold, in my judgment, is to place form above substance, and to deprive citizens and taxpayers of the protection heretofore supposed to have been secured by such constitutional restriction. If the legislature may rightfully exercise such unlimited power to make exactions from the income of railway companies, then I do not perceive why the legislature may not exercise unlimited power in making similar exactions from the income of other property by a similar method. Can it be that the legislature can exempt from taxation all property producing an income, and then in lieu of such exemption exercise unlimited power in exacting a percentage of such income through the so-called license system?

This opinion is written in no spirit of controversy, but merely to relieve myself from responsibilities which otherwise I would necessarily share, not only in the decision of this case, but also in the decision of the case of *Chicago & N. W. R. Co. v. State, post,* p. 553, 108 N. W. 557, and *Nunnemacher v. State,* 129 Wis. ——, both of which are decided herewith.

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CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. THE STATE and others, Respondents.

May 17—June 21, 1906.

TAXATION: RAILROADS: CONSTITUTIONAL LAW. (1) *Uniformity required only as to property taxed directly.* (2) *Taxation not limited to property.* (3–5) *Classification of property: Exemptions.* (6, 7) *Uniformity of burden, not of methods.* (8, 35) *Public service corporations: Franchises: Valuation of property as a unit and as personalty.* (9, 10) *Private corporations: Valuation.* (11) *Real property, how assessed.* (12, 13) *Errors of assessing board: Relief in equity.* (14, 15) *Levy of taxes by legislative power: What may be delegated to administrative officers.* (16, 17) *Amount of tax: Determination by legislature: General provisions.* (19–21) *Taxation of mortgages: Statute construed: Validity: Classification of debts.* (23) *Presumption as to validity of statute.* (18, 24, 35) Ad valorem *taxation of railroad property: State and local taxation involved: Constructive accounting.* (22) *Validity of method: Average rate of preceding year.* (25, 26) *Duty of state board in determining rate is ministerial: Notice to owners not necessary: Date fixed by law.* (27) *Railroads in separate class as to methods.* (28–35) *Situs of property for taxation: Railroad property: Personalty: Power of legislature: Taxing districts: Judicial review: Value of railroad property to be treated as a unit: Tax belongs to state: Constructive accounting with municipalities.*

Ch. 315, Laws of Wisconsin for 1903, among other things provides:

(A) For a preliminary assessment of all railway property in the state on the unit system, by a state board of assessors, they to consider certain specified evidentiary matters and others in their discretion and accord owners of such property a hearing and complete their determination of the cash value of the property by the first day of November of the year of commencing the work;

(B) For a determination by such board, by the day aforesaid, of the cash value of all general property in the state assessed to be taxed in the then year, certain specified data to be considered and all other evidentiary matters obtainable from all sources;

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(C) For a determination by said board, on and between the first Monday of December in the year aforesaid and the following 15th day of January, with reference to certain specified data, of the aggregate tax in the whole state for all purposes, state and local, except special assessments for local improvements, levied on the valuation aforesaid;

(D) For a session of such board, substantially continuing from the second Tuesday of November aforesaid till the 15th day of the following January, for the purpose of reviewing the assessment of railway property and the valuation of the general property made as aforesaid, any owner of railway property to have an opportunity during such period to be heard, (a) as to the valuation and assessment thereof, (b) as to the valuation of general property, and (c) as to the taxes to be levied on its property;

(E) For a determination by such board of the average rate of taxation on general property;

(F) For the making of a tax roll showing the names of all owners of railway property and the taxes thereon;

(G) For collecting, in due course, of such taxes by the state treasurer.

1. The first clause of sec. 1, art. VIII, of the constitution, declaring that the rule of taxation shall be uniform, relates to all property taxed directly, and that only. pp. 588–591.
2. Sec. 1, art. VIII, aforesaid does not limit the exercise of the power of taxation to that on property. p. 604.
3. Sec. 1, art. VIII, of the constitution limits taxation of property to such as the legislature shall prescribe, makes all such property one class, and ordains that the rule of taxation shall be uniform in respect thereto. pp. 603, 604.
4. The second clause of such section leaves the legislature unlimited authority as to what property shall be taxed and what shall not be taxed, subject to other equality clauses of the organic law, particularly sec. 1, art. I. In prescribing property for taxation all of any particular class must be so prescribed or be exempted. pp. 604, 606.
5. In prescribing property for direct taxation, or instrumentalities to effect such taxation, but not otherwise, under sec. 1, art. VIII, of the constitution, the legislature may classify and subclassify property, to the extent of distinguishing differences as to a particular class or subclass, reasonably requiring special treatment to promote the constitutional requirement that as to all property taxed the rule of taxation shall be uniform. pp. 609, 613, 655.
6. The rule of uniformity has reference to uniformity of burden, not

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necessarily uniformity of methods of imposing burdens and realizing thereon. pp. 613, 614.

7. The rule of uniformity for direct taxation on property is the rule ordained by the constitution itself, vitalized by legislative essentials necessary to its execution and aided by legislative details promoting its purpose to burden every dollar in value of all property prescribed for direct taxation, having regard to special conditions in the respective taxing districts, the same, as near as practicable, as every other dollar in value of such property is burdened. p. 613.

8. The property of a public service corporation is to be valued for taxation as a unit, the franchise element and tangible elements, whether in land or movables, being regarded as inseparable parts of one thing in which the former so far predominates as to stamp all with the impress of personal property. pp. 617–620.

9. In assessing property of ordinary corporations or of firms or individuals, the same is to be valued with reference to its use, situation, and all that concerns the same, no value being placed on such intangibles as good will or mere ordinary corporate rights or other mere circumstances other than as the same is included in the actual value of the tangible things, in the places and under the conditions in which they are found. p. 617.

10. Property owned by mere private corporations is to be valued the same as if owned by a private person. p. 625.

11. In assessing railway property for taxation, the assessing agency is not concerned with physical value, except as evidence of physical conditions; nor specially concerned with franchise value. All is to be valued as a unit, inseparable for the purpose of valuing any one element or determining the value, in the whole, by adding together the separate values of elements. pp. 620–624.

12. If the assessing agency, in valuing the general property taxed, commits jurisdictional or other error by including property not assessed by local assessors, such error affords owners of special property no ground for invoking equity jurisdiction. pp. 625, 626.

13. Unintentional omissions in assessing property for taxation, referable to mere error of judgment or inadvertence; or differences between different assessors as to the treatment of the same kind of property under the same or similar circumstances, or other mere errors of judgment or mistakes without fraud, do not affect the validity of the tax. pp. 626, 627.

14. A tax, state or local, must be levied, in the sense of voting the tax, by the legislative power to which the same is referable. That cannot be delegated to administrative officers. The act of

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laying the tax, and of determining the basis thereof as regards the valuation of property on the legislative plan, is administrative. The former is an act of making law, the latter of executing it. p. 629.

15. When the legislature determines to raise a stated sum of money by taxation, or the sum which a specific form of taxation may produce, and delegates to administrative officers the duty of ascertaining facts and making computations from given data or facts to be ascertained by such officers and of thereby fixing the rate and eventually the amount of the tax, it levies the same in a constitutional sense. p. 629.

16. Sec. 5, art. VIII, providing that "the legislature shall provide for an annual tax sufficient," etc., "and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year sufficient, with other sources of income," etc., is satisfied if the legislature determines, as shown by what it does, to raise by taxation a specific sum for public purposes, or such sum as the form of taxation adopted will produce. No express legislative estimate of the public needs is necessary, nor is annual or biennial legislation necessary. A law in that regard may provide generally for the future or till changed by the legislature. pp. 631–634.

17. Sec. 2, art. VIII, of the constitution, and sec. 5 are to be read together. The latter limits the exercise of the taxing power to public purposes, and the former, likewise, limits the use of the avails of such exercise. They do not limit the method of determining the needs therefor. p. 634.

18. The purpose of the *ad valorem* railway taxing law being to tax railway property upon the same basis and at the same rate as other property prescribed for direct taxation throughout the state is taxed, exclusive of special assessments, the avails in money should be regarded as the result, in effect, of state, county, city, town, village, and school and road district taxation, and as taking the form of state funds by a constructive accounting between the state and the localities. pp. 635, 636.

19. The effect of ch. 378, Laws of 1903, is to exempt from taxation, in cases mentioned, as personal property, any ordinary mortgage or lien in the nature of a mortgage on realty, and the debt secured thereby to the extent of the value of the security, such value being regarded as an interest in the realty in place of such mortgage and such part of the mortgage indebtedness, and to make the same taxable to the mortgagee separately from the value of the equity or to the mortgagor with the equity, the

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same as if the land were unincumbered, at the latter's option. pp. 637–639.

20. Under such law, so much of the mortgage indebtedness as measures the value of the security is excluded from that which the mortgagor may set off against his credits in determining the excess of the latter over his liabilities, and so subject to taxation, and is also not available to the mortgagee in making up his balance of credits over liabilities subject to taxation, but the excess of the mortgage indebtedness over the value of the security is a matter receivable as to the mortgagee and payable as to the mortgagor, to be taken account of by them respectively in determining the amount of their respective credits subject to taxation. p. 638.
21. The classification of mortgage indebtedness, as indicated, is legitimate under the doctrine of classification before stated. p. 647.
22. The feature of ch. 315, Laws of 1903, as to applying the average rate of taxation on general property one year on the value of railway property as to such year, in taxing the latter the succeeding year, is legitimate, regarded as a reasonable exercise of legislative judgment as to the method of burdening railway property with state and local taxes, except special assessments, the same as general property throughout the state, as near as practicable, and is consistent with sec. 1, art. VIII, of the constitution. p. 648.
23. It must be presumed in favor of an act of the legislature that the lawmaking power intended a valid enactment, and it is to be sustained if in any reasonable view thereof it can be fairly read in harmony with constitutional requirements. p. 650.
24. It is considered that ch. 315, Laws of 1903, contemplates, in effect, state and local taxation of railway property the same as of other property, as near as practicable, the state acting as agent for the localities and the latter for the former, the avails of the imposition on the railway property, after reaching the state treasury, and the corresponding results of the local impositions, after reaching local treasuries, remaining with the respective agencies for their use, as upon a constructive accounting and exchange of equivalents. pp. 651, 652.
25. The duty of the state board under ch. 315, Laws of 1903, as to determining the average rate of taxation on general property is wholly ministerial. No notice to the owners of railway property, or proceedings in that regard, with opportunity to be heard, is required under the constitutional provision as to due process of law, and none whatever except as provided by the written law. p. 652.

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26. A date being fixed by the law for the session of an administrative board to perform duties of a *quasi*-judicial nature, in which individuals are specially interested, no notice to the latter is necessary unless otherwise required by statute. p. 654.
27. It is within legislative discretion to place railway corporations in a class by themselves as regards instrumentalities for imposing upon their property the same rate of taxation, as near as practicable, as is imposed on all other property throughout the state, the design as to such instrumentalities being, in the judgment of the legislature, reasonably appropriate to effect the purpose that all property taxed directly shall be burdened according to the mandate of the constitution, that the rule of taxation shall be uniform. p. 655.
28. The legislature cannot arbitrarily or capriciously give property a situs for taxation. Tax burdens must be imposed on the state at large, the county at large, and on the smaller taxing districts at large, according as the purpose thereof is purely general or purely local to the particular taxing district. p. 661.
29. The scope of the power of the legislature to fix the situs of railway property for taxation has regard to the nature of such property as personalty. p. 662.
30. The doctrine that the situs of personal property for taxation is the home of the corporation, is the law of the state only in the absence of a law fixing some other situs within constitutional limitations. p. 665.
31. The limit of legislative power as to territory in fixing the situs of personal property for taxation is not the taxing districts in which the visible part of the railroad and its office or offices are located. p. 665.
32. The limitation above mentioned includes any taxing district where such relations exist between it and the owner of the property, either directly or with reference to such property, that, reasonably, it may be said the duty to pay the tax is a return obligation for some duty of the payee to extend to the former, either as to person or property, the benefits of its government. p. 665.
33. Whether the relations stated exist in any given circumstances is a legislative question, and wholly beyond judicial interference, except in case of manifest caprice or violation of the command that the rule of taxation shall be uniform. p. 665.
34. The peculiar nature of railway corporations as to their commanding position, the universality and closeness of their touch with the everyday life of the people, the mutual relations of de-

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pendence for well-being both as to persons and property, reaching the state at large, the needs of such corporations as to support and protection, the significant degree in which the administrative energy of all departments of the state is devoted to affairs concerning their regulation and well-being, and their public privileges springing from the whole people, warrant the exercise of legislative power, giving to their property for the purposes of taxation a general situs, and applying thereto the average rate of taxation throughout the state on general property prescribed for taxation, whether regarded as having a situs throughout the state or one limited to the taxing districts touched by their tracks. pp. 666–669.

35. The rule that property of a railway corporation, for the purposes of direct taxation, must be valued as a unit, reasonably demands that such value be treated as a unit, and, to the end that the rule of taxation may be uniform, that the average rate of taxation on general property throughout the taxing districts which, in any reasonable view, are entitled to participate in taxing such property, be applied thereto, and the avails be treated as belonging to the state for public purposes, on the theory of a constructive accounting between it and such taxing districts. pp. 670–676.

[Syllabus by MARSHALL, J.]

CASSODAY, C. J., concurring in the judgment, is of the opinion that under sec. 1, art. VIII, Const., the legislature has power to classify property for the purposes of taxation, and then to impose different rates of taxation upon the different classes. p. 677.

APPEAL from a judgment of the circuit court for Dane county: S. D. HASTINGS, Judge. *Affirmed.*

Action to enjoin collection of taxes levied upon the property of the plaintiff for 1904 pursuant to ch. 315, Laws of 1903.

The action was to test the validity of the law changing the method of requiring railway companies in this state to share with other property owners therein the burdens of its government from the indirect way to the *ad valorem* method. The facts pleaded and in issue and matters covered by the evidence, showing the general situation giving rise to the questions discussed in the opinion, are indicated in the following

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epitome of the trial court's findings. It should be noted that those portions thereof which are in *italics* were excepted to by the plaintiff, and those inclosed in brackets by the defendant:

(1) At and since the inception of this action defendant *Kempf,* as state treasurer, was in possession of the tax roll for 1904, made, as to railway property, by the state board of assessors under ch. 315, Laws of 1903.

(2) On December 12, 1904, plaintiff was duly notified thereof from the said treasurer's office, and of the tax thereon assessed against the plaintiff for the year 1904, that the same was $189,231.61 after allowing credit for license fees paid by defendant for such year, and payment within thirty days was demanded.

[(3) The assessment was made as of the year 1903.]

[(4) The value of such property was determined by the board as of the time in such year it determined the value of property generally *but not as of the time of local assessment.*]

[(5) The rate of taxation used in making the roll was determined thus: The value of all property in the state for 1903, exclusive of railroad property, taxed by the *ad valorem* method for state and local purposes was preliminarily determined at $1,753,120,000, without notice to plaintiff. Likewise the value of plaintiff's property in this state was determined. Such first-mentioned determination was entered in October, 1903. In September thereafter plaintiff was given a hearing as to both such determinations. The board then fixed the value of all property in the state other than railway property, taxed *ad valorem,* at $1,804,187,000, and taxes levied thereon for 1903 at $20,640,543.16, the latter without notice to plaintiff. On such basis the board determined the rate of taxation upon all property so taxed *ad valorem,* other than railroad property, for 1903, and applied the result to the assessment of plaintiff's property.]

(6) In determining the *ad valorem* taxes paid in the state

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for 1903, the board included all such taxes of every nature collected in any taxing district.

(7) During the time material to this litigation plaintiff did not have any property or office in any one of twenty-five counties of the state.

[(8) The rate of taxation in this state on all property other than railroad property, for 1903, and the rate also for 1904 in many counties where plaintiff's road was located, were less than that applied to plaintiff's property.]

(9) Plaintiff, during all the time affected by this litigation, was a corporation organized under the laws of Illinois, Michigan, and Wisconsin, and was engaged in local and interstate business, the latter extending into many states.

(10) *In assessing plaintiff's property, the board considered the entire railway system and all things affecting the value, but did not include any sum on account of franchises other than those referable to the laws of Wisconsin.*

[(11) When ch. 315, Laws of 1903, became effective there were and since have been numerous street railway systems in the state, some doing the ordinary business of such systems and some operating in and through two or more cities, villages, or towns, and doing, in some respects, ordinary railway business.]

(12) Such street railway systems were not taxed for 1904 under the aforesaid law.

(13) During the time affected by this litigation there were several railway systems in the state operated by electric power, the owners having the right of eminent domain and having used it in the establishment of such systems in the manner of ordinary railway companies. Such owners were authorized by their charters to carry freight and passengers and to make rates, and the systems were operated between cities wide apart. [*The board did not know thereof when making the assessment of plaintiff's property.*]

(14) *Neither sleeping-car companies nor the owners of*

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railway property mentioned in findings 11, 12, and 13, are classed with ordinary railroads under such law, nor in fact belong thereto, nor are engaged in the same business, nor are operated under the same conditions, nor do they possess in all respects the same powers and privileges.

[(15) None of the corporations mentioned in (13) were treated by the state board as under said law of 1903.]

[(16) Twenty-eight assessors, under objection by counsel for defendants, testified, in effect, that in valuing the property for taxation for 1903 they did not include any sum for corporate franchises other than in a few cases, such as gas companies and electric light companies, whose franchises are expressly required to be taxed, or include business done by such companies, or consider the amount, character, market price, or actual value of the capital stock or funded indebtedness of any corporation or joint-stock company, but fixed the value solely with reference to the physical property, and that the elements omitted, had they been included, would have largely increased the aggregate value of the property assessed.]

[(17) *The state board, in fixing the value of general property, considered all elements mentioned in sec. 9 of ch. 315, aforesaid, including the local tax rolls: generally speaking, all official statistics and all others obtainable affecting the matter and all evidence obtainable from all sources, and acted upon their best judgment and knowledge, and raised the aggregate value of local assessments without adding anything specifically for value of franchises, only considering the same as affecting the value of corporate property. They did not add, specifically, for good will of business, or specially consider earnings or profits, or the value of stock or bonds, and make additions on account thereof.*]

[(18) In valuing plaintiff's property its franchises were considered; its earning capacity, and the market value of its stocks and bonds.]

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[(19) Members of the board were of the opinion that the value of plaintiff's physical property in Wisconsin in 1904 was several million dollars less than the value placed upon its property in the state as a whole, the difference between such physical value and the assessed value being on account of franchises and other things considered by the board.]

(20) *The local assessors acted honestly in doing their work, assessing all property at what they considered the actual value, any omissions being attributable to ignorance or error of judgment.*

[(21) In 1903 and 1904, as a rule, mortgage interests in lands in this state owned by residents thereof, but residing outside of the districts where the lands were situated, were assessed to the owners of such interests, to the extent of the value thereof, the value of the equities in the lands being assessed to the mortgagors. Plaintiff's property in Wisconsin, though incumbered by mortgages to the amount of many millions of dollars, as was well known to said board when the assessment complained of was made, was assessed regardless thereof, no deduction being made on account of the same. In some instances said mortgages did not contain any requirement for the mortgagor to pay the taxes levied on the mortgaged property.]

[(22) When the action was commenced said treasurer was not financially capable of responding to plaintiff, in case of a judgment in its favor, for return of the tax in question.]

(23) Plaintiff's gross earnings in Wisconsin for 1903 were $15,718,846.17, and in due course, on account thereof, it paid the statutory license fee tax, amounting to $628,753.84, receiving a license to transact business for one year under sec. 1212, Stats. 1898. [It has offered and is ready to pay any additional sum which it ought to pay upon the same being duly ascertained.]

(24) *Said board throughout acted in good faith and according to law, as they viewed the same.*

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The legal results of such facts, the court concluded, were these: The law of 1903 is valid; the proceedings complained of were regular; defendant is entitled to a dismissal of the complaint with costs.

There were numerous exceptions filed to refusals to find as requested by plaintiff's counsel, which will be referred to in the opinion if found necessary.

From the judgment entered according to the foregoing this appeal was taken.

Edward M. Hyzer, attorney, and *Lloyd M. Bowers,* of counsel, for the appellant, contended, *inter alia,* that ch. 315, Laws of 1903, violates sec. 5, art. VIII, of the state constitution. That section requires that a tax levied by the legislature for the state be founded upon a legislative consideration and estimate of the state expenses, for meeting which the tax is raised. By ch. 315 the legislature has made the state's revenue depend upon, and vary directly with, the amounts of taxes raised from year to year by the several local legislatures of the various counties, cities, towns, villages, and school districts for their local purposes; and the question in hand is whether the state tax so resulting can be considered to be what the legislature has decided to be the amount needed for the state's expenses. The answer to that question must depend upon the test whether it is a *reasonable* idea that the state's expenses are proportionate to the aggregate amount which county boards, city councils, town boards, village boards, and school-district boards throughout the state decide from year to year that they will raise in taxes for the purposes of their various local communities; which purposes embrace not only those of local government, but also (and largely) those of local improvements and investments. *People v. Fire Asso.* 92 N. Y. 311. Local taxes raised for purposes like the establishment or maintenance of parks, public baths, municipal gas works, water works, etc., are purely private

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and proprietary, fundamentally different from taxes for truly governmental purposes. *Milwaukee v. Milwaukee,* 12 Wis. 93; *State ex rel. Board of Ed. v. Haben,* 22 Wis. 660; *Becker v. La Crosse,* 99 Wis. 414, 418, 419, 421. How can it be said that the state's expenses are proportionate to the private investments of the various local communities in the state? As well might the legislature say that plaintiff's tax should be determined by inclusion in the average-rate process of all amounts spent by strictly private gas companies, water companies, street railway companies, etc., for their plants in the state. How can the collective action of the numerous local legislatures, in determining local policies—partly governmental, but also largely private and proprietary—and fixing local taxes in aid of those policies, be said to afford any reasonable test, or measure, of the revenue which the state needs for its own purposes? See *Pingree v. Auditor General,* 120 Mich. 95, 102. The two fundamental questions before a legislature, in exercising a power to tax, are: (1) how much revenue the state needs; and (2) what will be a just distribution of the burden. The first of these questions is the more radical. The revenue that the state needs is independent of its distribution among different classes of taxpayers; but that distribution concerns, and should stop with, the needed revenue. The statute turns the general problem of taxation upside down, by making the apportionment of taxation generally, as between all citizens for all purposes, control the amount of the state's revenue. The constitution limits the annual tax to an amount "sufficient to defray the estimated expenses of the state for each year." *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 578; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 141. But the tax now provided for is made independent of and wholly unrelated to the state's expenses. Ch. 315 violates sec. 5, art. VIII, Const., for the further reason that the "average rate" is required to be com-

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puted on the basis of the state and local taxes paid on other property in the year preceding that for which the railroad is taxed at such average rate.

Ch. 315 violates sec. 13, art. I, Const., which declares that "the property of no person shall be taken for public use without just compensation therefor," because the "average rate" of tax exacted from a railroad is founded in large part upon the governmental expenses and proprietary outlays of local communities whose benefits the taxpaying railroad does not share, because it has no property whatever and no office in those communities. The rule is that a tax must be founded upon the expenses of a government whose benefits the taxpayer shares. *State ex rel. New Richmond v. Davidson,* 114 Wis. 563; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 140, 141; *Marsh v. Clark Co.* 42 Wis. 502, 509; *Warden v. Fond du Lac Co.* 14 Wis. 618, 619, 620; *Sleight v. People,* 74 Ill. 47, 49; *Allhands v. People,* 82 Ill. 234; *Drake v. Ogden,* 128 Ill. 603; *Bellepoint v. Pence,* 13 Ky. Law Rep. 371, 17 S. W. 197; *County Comm'rs v. County Comm'rs,* 50 Md. 245, 259, 260; *Wells v. Weston,* 22 Mo. 384; *In re Lands in Flatbush,* 60 N. Y. 398, 406, 407; *Platt v. Milton,* 58 Vt. 608; *Simon v. Northup,* 27 Oreg. 487, 503, 504; *Berlin M. Co. v. Wentworth's Location,* 60 N. H. 156; *In re Madera Irr. Dist.* 92 Cal. 296, 304; *Farris v. Vannier,* 6 Dak. 186. This rule requires more than that a tax be laid by, and paid into the treasury of, a government from which the taxpayer benefits. It demands that one taxpayer be not charged more than others of the expenses of a government (the state) which they both enjoy, because of and in proportion to the taxes which those others pay for the support of other governments (a city, town, village, or school district) from which the first named taxpayer does not benefit. See 1 Cooley, Taxation (3d ed.) 187, 188; *Bellepoint v. Pence,* 13 Ky. Law Rep. 371, 17 S. W. 197; *Howell v. Bristol,* 8 Bush, 493, 499; *County Comm'rs v. Comm'rs,* 70 Md. 443,

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447; *Ryerson v. Utley,* 16 Mich. 269, 276; *State ex rel. Leffingwell v. Chouteau,* 54 Mo. 458, 473.

Ch. 315 violates sec. 1, art. I, and also sec. 13, art. I, Const., because it taxes a railroad—no less because indirectly—for the relief of the inhabitants of counties, cities, towns, villages, and school districts of Wisconsin, in which the railroad has no property or office, from a part of the expenses of their purely local governments and private local investments and enterprises. *State Treasurer v. Auditor General,* 46 Mich. 224, 230, 231; *Callam v. Saginaw,* 50 Mich. 7, 11; *Louisville & J. F. Co. v. Kentucky,* 188 U. S. 385; *Delaware, L. & W. R. Co. v. Pennsylvania,* 198 U. S. 341; 1 Cooley, Taxation (3d ed.) 82, 249; Judson, Taxation, § 354. The legislature cannot (as by ch. 315 it has attempted) give railroad property (and such property only) a situs all over the state, in disregard of the actual location of that property and of the railroad company's principal office or place of business. *Teagan Transp. Co. v. Board of Assessors* (Mich.) 102 N. W. 273; *Union R. T. Co. v. Kentucky,* 199 U. S. 194.

The power of fixing the rate (and so the amount) of tax upon a railroad is delegated by ch. 315 to the various local legislatures of the counties, cities, towns, villages, and school districts of Wisconsin (including those local legislatures within whose jurisdiction the railroad has no property or office); and this violates sec. 1, art. IV, Const., which declares that "the legislative power shall be vested in a senate and assembly." There is no tax until its amount is prescribed, and the body that determines the amount levies the tax. "An undetermined tax is in law no tax." 1 Cooley, Taxation (3d ed.) 557; *Morton v. Comptroller General,* 4 S. C. 430, 454; *Houghton v. Austin,* 47 Cal. 646; *San Francisco & N. P. R. Co. v. State Board,* 60 Cal. 12, 34. The amount of tax required to be paid on railroad property is largely, and indeed chiefly, determined by the local legisla-

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tures throughout Wisconsin in their *legislative* prescription of local taxes; for by the amount of those taxes the railroad tax is chiefly measured. This case is entirely different from those in which the operation of a statute is made to depend upon a contingent *fact,* or upon the decision of an executive or administrative officer as to such fact. *Miller v. New York,* 109 U. S. 385; *Field v. Clark,* 143 U. S. 649. The legislative action of the county, city, town, village, and school district in determining the amount of local taxes, and so largely determining the "average rate" of tax, is entirely independent of any rule prescribed by the state legislature to guide them. This fundamentally distinguishes ch. 315 from the numerous cases holding that a legislature may properly empower executive or administrative officials to adopt incidental, executive rules of detail, which conform to the central plan and principles of a statute. *Buttfield v. Stranahan,* 192 U. S. 470; *In re Kollock,* 165 U. S. 526, 533, 536; *St. Louis C. C. Co. v. Illinois,* 185 U. S. 203, 210–212. The following cases concerning taxation are directly in point to show that ch. 315 delegates the taxing power to the various local legislatures: *Houghton v. Austin,* 47 Cal. 646; *People ex rel. Hopkins v. Kings Co.* 52 N. Y. 556, 566, 567; *Board of Comm'rs v. Abbott,* 52 Kan. 148; *Parks v. Board of Comm'rs,* 61 Fed. 436; *Central R. Co. v. State Board,* 49 N. J. Law, 1, 17, 18; *Muhlenberg Co. v. Morehead* (Ky.) 46 S. W. 484; *Fleming v. Dyer* (Ky.) 47 S. W. 444; *Dawson v. Ward,* 71 Tex. 72, 76; *Wade v. State,* 22 Tex. App. 629; *McCabe v. Carpenter,* 102 Cal. 469; *Schultes v. Eberly,* 82 Ala. 242; *Wells v. Weston,* 22 Mo. 384; *Wilcox v. Paddock,* 65 Mich. 23, 28, 29; *State ex rel. Howe v. Des Moines,* 103 Iowa, 76; *Marr v. Enloe,* 9 Tenn. 452, 454; *Board of Directors v. Houston,* 71 Ill. 318; *Gage v. Graham,* 57 Ill. 144. The following cases give instances of delegation of legislative power in other fields than taxation: *Slinger v. Henneman,* 38 Wis. 504; *Dowling v. Lancashire Ins. Co.* 92 Wis.

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63; *In re North Milwaukee,* 93 Wis. 616; *State ex rel. Adams v. Burdge,* 95 Wis. 390; *King v. Concordia F. Ins. Co.* (Mich.) 103 N. W. 616; *Elliott v. Detroit,* 121 Mich. 611; *Bradshaw v. Lankford,* 73 Md. 428; *People v. Parks,* 58 Cal. 624, 641–643; *O'Neil v. American F. Ins. Co.* 166 Pa. St. 72, 77; *State ex rel. N. Y. & N. J. Tel. Co. v. Bound Brook,* 66 N. J. Law, 168, 48 Atl. 1022; *Stevens v. Truman,* 127 Cal. 155; *Jernigan v. Madisonville,* 102 Ky. 313; *Schaezlein v. Cabaniss,* 135 Cal. 466; *Harmon v. State,* 66 Ohio St. 249; *Beasley v. Ridout,* 94 Md. 641, 658; *State ex rel. Montgomery v. Rogers* (Ohio) 73 N. E. 461. The fact that under ch. 315 a railroad has no real opportunity for hearing by the legislature on the question of the amount of tax which it shall be required to pay to the state illustrates practically the point that the determination of that amount is not made by the legislature. The rule that a taxpayer is constitutionally entitled to a hearing on the amount of his tax includes the right of hearing on that point before the legislature. Such privilege is part of the general right of appearance before, or petition to, the legislature; which is part of the law of the land. Cooley, Const. Lim. (7th ed.) 497, 498; 2 Story, Const. (5th ed.) § 1894; *U. S. v. Cruikshank,* 92 U. S. 542, 552; sec. 4, art. I, Const. of Wis.; *State Tax-Law Cases,* 54 Mich. 350, 382; *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112, 170, 174, 175; *French v. Barber A. P. Co.* 181 U. S. 324, 339–341.

Ch. 315 violates sec. 1, art. VIII, Const., which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." It is clear that ch. 315 imposes a property tax, rather than a specific tax. The language leaves no room for doubt; and the exactly similar tax held unconstitutional in Michigan was decided to be a property tax. *Pingree v. Auditor General,* 120 Mich. 95, 97–102. When the legislature sees fit, as in ch. 315 it has seen fit, to tax a particular kind

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of property upon its value, it is not uniform taxation to impose a rate of tax upon that value which is different from the rate applied to the same value of other property taxed *ad valorem;* and this is so because, even if the right of the legislature to classify property for taxation exists under sec. 1, art. VIII, of the constitution, such classification must tend toward equal taxation, or, at any rate, not unmistakably create unequal taxation. *Pingree v. Auditor General,* 120 Mich. 95; *Savannah v. Weed,* 84 Ga. 683, 11 S. E. 235; *Standard Oil Co. v. Comm.* (Ky.) 82 S. W. 1020; *Nathan v. Spokane Co.* 35 Wash. 26, 76 Pac. 521; *High School Dist. v. Lancaster Co.* 60 Neb. 147, 82 N. W. 380; *State v. Eastabrook,* 3 Nev. 173; *State v. Kruttschnitt,* 4 Nev. 178; *State v. Cumberland & P. R. Co.* 40 Md. 22, 49; *Shenandoah Valley R. Co. v. Clarke Co.* 78 Va. 269; *Western U. Tel. Co. v. Omaha* (Neb.) 103 N. W. 84; *State ex rel. Shriver v. Karr,* 64 Neb. 514; *State v. Ins. Co. of N. A.* (Neb.) 100 N. W. 405; *Little Rock & Ft. S. R. Co. v. Worthen,* 46 Ark. 312; *State ex rel. Bee Bldg. Co. v. Savage,* 65 Neb. 714, 91 N. W. 716; *Board of Assessors v. Ala. Cent. R. Co.* 59 Ala. 551; *Cheshire v. County Comm'rs,* 118 Mass. 386; *Atlantic & N. C. R. Co. v. Carteret Co.* 75 N. C. 474; *Pike v. State,* 5 Ark. 204; *State Bank v. Board of Revenue,* 91 Ala. 217, 8 South. 852. When the legislature says that two or more different kinds of property shall be taxed on the *ad valorem* plan, it thereby recognizes that it finds no sufficient reason for departing from that plan; in other words, it admits that the property can be reliably found for taxation and can be reliably valued. For the purpose of taxation on value, therefore, the legislature puts all those kinds of property into one class; and, after it has done that, no just basis for discriminating rates can be said to exist. See *Knowlton v. Rock Co.* 9 Wis. 410; *Hale v. Kenosha,* 29 Wis. 599; *Weeks v. Milwaukee,* 10 Wis. 242; *Lumsden v. Cross,* 10 Wis. 282; *Att'y Gen. v. Winnebago Lake & F. R. P. R.* ' 11 Wis. 35;

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State ex rel. Reedsburg Bank v. Hastings, 12 Wis. 47; *Slauson v. Racine,* 13 Wis. 398; *Saltonstall v. Board of Review,* 132 Mich. 196; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664; *Gilman v. Sheboygan,* 2 Black, 510; *Lund v. Chippewa Co.* 93 Wis. 640; *Black v. State,* 113 Wis. 205. Cases under the "equal protection" clause of the United States constitution are not pertinent to sec. 1, art. VIII, of the Wisconsin constitution. That clause is analogous, rather, with sec. 1, art. I, of the Wisconsin constitution; and, like it, has an elasticity not belonging to the provision for "a uniform rule of taxation." But, even under the XIVth amendment of the federal constitution, tax laws and other laws are invalid which directly and necessarily lead to inequality. *Black v. State,* 113 Wis. 205, 218, 219; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79, 110; *Magoun v. Illinois T. & S. Bank,* 170 U. S. 283, 301; *Santa Clara Co. v. So. Pac. R. Co.* 18 Fed. 385, 399; *Railroad Tax Cases,* 13 Fed. 722, 734. And the doctrine that classification must be reasonable—not arbitrary and discriminatory—obtains with full force under the federal constitution. *Yick Wo v. Hopkins,* 118 U. S. 356, 369; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 237; *Barbier v. Connolly,* 113 U. S. 27, 31, 32; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 155, 159, 165; *U. S. v. Cruikshank,* 92 U. S. 542, 554. Uniform taxation requires (even if classification permits unequal rates on the same value of different sorts of property) that the legislature order what it thinks a just relation (whether of equality or prescribed inequality) between the taxes of different persons for the support of those governments whose benefits those persons share; and forbids the establishment of a relation (whether of equality or prescribed inequality) between the taxes of different persons for the support of governments whose benefits those persons do not share. *People ex rel. D. & H. R. Co. v. Salem,* 20 Mich. 453, 474; 1 Cooley, Taxation (3d ed.) 225–227; *Atchison, T. & S. F. R. Co. v. Clark,* 60 Kan. 826,

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830; *Hutchinson v. Ozark L. Co.* 57 Ark. 554; *St. Louis v. Spiegel,* 75 Mo. 145; *State ex rel. Trustees v. Township Committee,* 7 Vroom, 66; *Kansas City v. Whipple,* 136 Mo. 475, 484; *State v. Hoyt,* 71 Vt. 59; *Lund v. Chippewa Co.* 93 Wis. 640, 647; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 575–578; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 140. Apportionment on a proper principle is essential in all taxation. 1 Cooley, Taxation (3d ed.) 411; Judson, Taxation, § 340; *Morton v. Comptroller General,* 4 S. C. 430, 454; *Santa Clara Co. v. So. Pac. R. Co.* 18 Fed. 385, 400, 424; *Lexington v. McQuillan's Heirs,* 9 Dana, 513, 517–519; *Railroad Tax Cases,* 13 Fed. 722, 734; *Williams v. Detroit,* 2 Mich. 560, 572; *Central R. Co. v. State Board,* 48 N. J. Law, 1, 11; *State ex rel. Trustees v. Township Committee,* 36 N. J. Law, 66. The effect and purpose of the average-rate plan established by ch. 315 is to put upon the appellant part of the burden of supporting the local governments, and of creating and maintaining the local communities' private investments, in the twenty-five counties of Wisconsin which the railroad does not enter. Consequently it violates the rule of uniform taxation under the doctrine of this court in *Lund v. Chippewa Co.* 93 Wis. 640, 647; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 575–578; and *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 140. Ch. 315 really makes the amount a railroad shall pay as a return for the benefits of those local governments which it enjoys depend upon and vary with the taxes (and consequently the expenses) of local governments whose benefits the railroad does not enjoy. Classification for taxation as for other purposes must be reasonable and fair, not arbitrary and discriminatory, and must rest upon a principle of distinction which affords a just basis for such difference of treatment as the different classes receive. *Black v. State,* 113 Wis. 205, 221; *State v. Whitcom,* 122 Wis. 110; *Battles v. Doll,* 113 Wis. 357, 361; *State ex rel. Kellogg v. Currens,* 111 Wis.

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431, 436; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 155, 159, 165; *Dibrell v. Morris's Heirs* (Tenn.) 15 S. W. 87, 95; *South & N. A. R. Co. v. Morris,* 65 Ala. 193, 199; *State v. Loomis,* 115 Mo. 307, 314; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 384; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 35; *Park v. Detroit Free Press Co.* 72 Mich. 560, 566, 567; *Grand Rapids C. Co. v. Runnels,* 77 Mich. 104; *San Antonio & A. P. R. Co. v. Wilson* (Tex.) 19 S. W. 910; *Millett v. People,* 117 Ill. 294; *Frorer v. People,* 141 Ill. 171; *Eden v. People,* 161 Ill. 296; *Janesville v. Carpenter,* 77 Wis. 288, 302; *Durkee v. Janesville,* 28 Wis. 464; *State v. Goodwill,* 33 W. Va. 179; *State v. Fire Creek C. & C. Co.* 33 W. Va. 188; *Pearson v. Portland,* 69 Me. 278, 281; *State v. Haun,* 61 Kan. 146, 152–154. The application of the average-rate tax under ch. 315 to an assessment of railroad property at its value in the year before that for which the tax is paid, while all other property in the state has the ordinary rate of state tax applied to an assessment of its value in the very year for which the tax is paid, violates the constitutional rule of uniform taxation. Ch. 315 is invalid because street and interurban railways, formed under secs. 1862, 1863, Stats. 1898, were not included within its operation. No difference exists between such railways and steam railways, except size; and that is not a proper basis for different treatment. *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83; *La Crosse City R. Co. v. Higbee,* 107 Wis. 389.

Ch. 315 violates the XIVth amendment to the federal constitution. It denies to the appellant "due process of law," because the "average rate" (not being founded on an estimate of the state's expenses, and being fixed by the local legislatures of the counties, etc.) is not representative, or even legislative, taxation; because appellant's property is taxed in

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aid of communities in which no part of the property is situated and appellant has no office, and the benefits of which appellant, therefore, does not share; and because appellant's property is taxed for purposes which, as to appellant, are merely private. It also denies to appellant the equal protection of the laws. When elements, fundamental in the very conception of a tax, are absent, the charge is not a tax at all, but a form of confiscation. Judson, Taxation, §§ 340, 341, 392; *State Board v. Holliday,* 150 Ind. 216; *Lexington v. McQuillan's Heirs,* 9 Dana, 513, 517, 518; *Woodbridge v. Detroit,* 8 Mich. 274, 301; *State ex rel. Trustees v. Township Committee,* 36 N. J. Law, 66, 69, 70.

The action of the local assessors in assessing, and the action of the state board in valuing (for computation of the average rate), the general property of the state in 1903 unlawfully increased the average rate of tax applied to appellant's property in 1904. The local assessors did not consider at all the franchises of any corporations, except the few *quasi*-public corporations whose franchises the statutes expressly require to be assessed, and did not consider the earnings of any property or of any business done thereon or therewith, or the good will of any business, or the market prices or values of the stock or bonds of any corporation. The state board, in computing the average rate, valued the general property in like manner as the assessors did; but in assessing the railroads they included franchises and considered all the elements which were omitted as to other property. Franchises are taxable property, even when the statute does not expressly and by name require their assessment; and they are personal property. *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550. Further, franchises cannot be assessed as part, or under the description, of the corporation's tangible personalty or realty; and their value, therefore, cannot be deemed to have been included in the local assessments of the general property of the state or in the state board's

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valuation of such general property. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554; *Fond du Lac W. Co. v. Fond du Lac,* 82 Wis. 322; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11. If good will is taxable property under the statutes, the situation as to it is the same as the situation about franchises. See *First Nat. Bank v. Douglas Co.* 124 Wis. 15, 19. The earnings, gross or net, of taxable property and the price of the stocks and bonds of corporations owning such property are not themselves taxable property, but are evidences of the value of such property. The action of the assessors and state board was, as to franchises and good will, an omission of property from assessment through mistake of law in believing franchises and good will not taxable; and, as to other property, a systematic refusal at all to consider pertinent evidences of value, through mistake of law again, in believing such evidences not pertinent and not a proper subject of consideration. Intentional omission of taxable property from assessment invalidates a tax affected by it. *Hersey v. Milwaukee Co.* 16 Wis. 185; *Smith v. Smith,* 19 Wis. 615; *Johnston v. Oshkosh,* 65 Wis. 473; *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 587. An omission of taxable property from assessment through mistake of law in believing it not taxable is the same as intentional omission; and likewise invalidates the tax affected by it. *Marsh v. Clark Co.* 42 Wis. 502; *Weeks v. Milwaukee,* 10 Wis. 242, 264; *Johnston v. Oshkosh,* 65 Wis. 473; *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 587. Therefore, the omission of franchises and good will from the assessment of general property by the local assessors and from the valuation of general property by the state board invalidated the tax upon appellant's property for 1904. Equally, intentional under-assessment of property invalidates a tax affected by it. *Spear v. Door Co.* 65 Wis. 298, 305; *Clarke v. Lincoln Co.* 54 Wis. 580; *Salscheider v. Ft. Howard,* 45 Wis. 519; *Schettler v. Ft. Howard,* 43 Wis. 48; *Goff v. Outagamie Co.* 43 Wis. 55; *Marsh v.*

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Clark Co. 42 Wis. 502. And (as in the case of omission of taxable property from assessment) under-assessment through mistake of law is the same as intentional under-valuation. Why is not systematic refusal to consider pertinent evidences of value through mistake of law the same thing in nature and effect as omission or under-valuation of taxable property through mistake of law? The former involves the latter. See *Bradley v. Lincoln Co.* 60 Wis. 71, 73; *Hewitt v. Butterfield,* 52 Wis. 384; *Hersey v. Barron Co.* 37 Wis. 75. The assessment of appellant's property by the state board included the things, viz., franchises and good will, which were omitted from the assessment of the general property of the state by the local assessors and from the valuation of that property by the state board; and the assessment of appellant's property by the state board resulted from an extensive and careful consideration of those very evidences of value, viz., gross and net earnings and stock and bond prices, which the local assessors and the state board omitted to consider in valuing the general property. Such fundamentally different treatment of appellant's property and of the general property of the state violates the rule of uniform assessment of property at its value, which is established by ch. 315—especially sec. 7—and by the general tax laws of Wisconsin. *Hale v. Kenosha,* 29 Wis. 599; *Marsh v. Clark Co.* 42 Wis. 502, 509; *Saltonstall v. Board of Review,* 132 Mich. 196; *Knowlton v. Rock Co.* 9 Wis. 410; *Taylor v. Louisville & N. R. Co.* 88 Fed. 350; *People v. Weaver,* 100 U. S. 539; *Sup'rs v. Stanley,* 105 U. S. 305; *Pelton v. National Bank,* 101 U. S. 143; *San Francisco Nat. Bank v. Dodge,* 197 U. S. 70; *Western U. Tel. Co. v. Omaha* (Neb.) 103 N. W. 84; *Little Rock & Ft. S. R. Co. v. Worthen,* 46 Ark. 312; *State ex rel. Bee Bldg. Co. v. Savage,* 65 Neb. 714; *Board of Assessment v. Ala. Cent. R. Co.* 59 Ala. 551; *Doster v. Sterling,* 33 Kan. 381. Appellant's railroad in Wisconsin was subject in 1903 and 1904 to mortgages securing unpaid indebtedness of many

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million dollars; but the state board of assessment made no deduction from the gross value of the railroad property, in assessment thereof for taxation against appellant, on account of these mortgages, though mortgagors of real estate generally in Wisconsin were taxed on an assessment of only their equity of redemption in obedience to the provisions of ch. 378, Laws of 1903. This was inconsistent with the constitutional requirement of a uniform rule of taxation. *San Mateo Co. v. So. Pac. R. Co.* 13 Fed. 145; *Railroad Tax Cases,* 13 Fed. 722, 737, 738; *Santa Clara Co. v. So. Pac. R. Co.* 18 Fed. 385, 394, 401, 402; *Russell v. Croy,* 164 Mo. 69; *Nashville, C. & St. L. R. Co. v. Taylor,* 86 Fed. 168, 179; *Fraser v. McConway & T. Co.* 82 Fed. 287; *Kingsley v. Merrill,* 122 Wis. 185, 205. Another discrimination in assessments arises under ch. 315 and ch. 378, in that they command a different rule for taxation of a railroad company and others on the same sort of property, viz., credits, according to the mere incidental contingency whether or not the credits of others than the railroad are secured by land mortgage; and that contingency, on which the different tax is made thus to depend, is not a reasonable basis for such different taxation, because it is made to result in the taxation of secured, and so better quality, debts at less than unsecured debts of like amount. See *Pullman State Bank v. Manring,* 18 Wash. 250, 51 Pac. 464; *Fayette Co. Treas. v. People's & D. Bank,* 47 Ohio St. 503; *Detroit C. St. R. Co. v. Detroit,* 125 Mich. 673; *State Bank v. Board of Revenue,* 91 Ala. 217, 8 South. 852.

H. O. Fairchild, of counsel for the appellant, contended, *inter alia,* that ch. 315 unlawfully discriminates between railroad property and general property in the matter of the revenues to which they are to contribute and the rate of taxation imposed. Railroad property is called upon to pay a large state tax from which general property is entirely relieved, and general property is required to pay state, county, and municipal taxes, from which railroad property is wholly exempt.

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The rate of taxation imposed on these properties is different in amount and, as between them, is not levied by a uniform rule. This constitutes unlawful discrimination. Under an *ad valorem* system of taxation of property the duty of dividing the state into assessment districts, and the valuing of the property in each and equalizing such values between the districts and apportioning the whole amount of the public burdens between such districts upon the basis of such equalization, is imperative. Cooley, Const. Lim. (7th ed.) 710, 711; Cooley, Taxation (2d ed.) 244, 245; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 86; *State ex rel. Holt L. Co. v. Bellew,* 86 Wis. 189, 195. As to railroad property the legislature has made the whole state a district and levied but a single tax; while as to general property the state is divided into hundreds of taxing districts, in which other state, county, and municipal taxes are levied, in which railroad property does not participate. See *Pingree v. Auditor General,* 120 Mich. 95; *Pine Grove v. Talcott,* 19 Wall. 666, 675; sec. 1, art. VIII, Const.; *Lund v. Chippewa Co.* 93 Wis. 640, 647; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 577; *State v. Canda C. C. Co.* 85 Minn. 457, 461; *Board of Co. Comm'rs v. Citizens' Nat. Bank,* 23 Minn. 280, 287; *Adams v. Mississippi State Bank,* 75 Miss. 701, 23 South. 395. There is no middle ground between authority to fix different rates on different subjects taxable *ad valorem* by uniform rule and the power to establish favoritism and destroy equality. Ch. 315 should have been framed so that, after the value of railroad property was ascertained by the state board of assessment, that value should be distributed among the taxing districts of the state through which railroad lines extend—in proportion to operated mileage or other just method of distribution,—where the local rate could be applied. Providing other methods of assessing railroad property and other methods of collecting the tax, in case of default, than the methods adopted as to general property, does

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not justify the application of different rates in the levying of the tax. So long as railroad property and the general property of the state remain taxable according to or in proportion to value, neither can be exempted or relieved from a state tax which the other is charged, without violating both uniformity and equality. *Hale v. Kenosha,* 29 Wis. 599; *Opinions of Justices,* 97 Me. 595; *Knowlton v. Rock Co.* 9 Wis. 410; *Knowlton v. Rock Co.* 15 Wis. 600; *Gilman v. Sheboygan,* 2 Black, 510; *Dyar v. Farmington,* 70 Me. 515.

There was also a brief by *George R. Peck,* of counsel for the Chicago, Milwaukee & St. Paul Railway Company, as *amicus curiæ.*

The *Attorney General,* and *H. W. Chynoweth* and *I. L. Lenroot,* of counsel, for the respondents, argued, among other things, that the legislature, in ch. 315, Laws of 1903, has properly treated the property of appellant as a unit. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554; *Fond du Lac Water Co. v. Fond du Lac,* 82 Wis. 322; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11; *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550; *Pittsburg T. Lab. v. Milwaukee E. R. & L. Co.* 110 Wis. 633; *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249; *Washburn v. Washburn W. W. Co.* 120 Wis. 575; *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80. The act prescribes the taxing district and makes the entire state, for the taxation of railway property, a single district. The power of the legislature is plenary to create and establish such a district. *Land, L. & L. Co. v. Brown,* 73 Wis. 294, 303; *Teegarden v. Racine,* 56 Wis. 545; *Dickson v. Racine,* 61 Wis. 545, 549; *T. B. Scott L. Co. v. Oneida Co.* 72 Wis. 158; *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485. Ch. 315 does not violate the provisions of sec. 1, art. VIII, Const. By it, railway property is made, for the purposes of taxation, a class by itself. This is a legitimate exercise of legislative power. That property may be classified for the purposes of

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taxation has been too firmly established by the decisions of this court to now admit of controversy. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37; *Kneeland v. Milwaukee,* 15 Wis. 454; *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485; *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 476; *State ex rel. Holt L. Co. v. Bellew,* 86 Wis. 189, 195; *State v. Whitcom,* 122 Wis. 110; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 42; *Black v. State,* 113 Wis. 205; *Battles v. Doll,* 113 Wis. 357. The decisions of the federal courts are in harmony with the doctrine of this court on the subject of classification. *Kentucky Railroad Tax Cases,* 115 U. S. 321; *State Railroad Tax Cases,* 92 U. S. 575, 611; *Columbus S. R. Co. v. Wright,* 151 U. S. 470; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421; *Florida C. & P. R. Co. v. Reynolds,* 183 U. S. 471, 480; *McHenry v. Alford,* 168 U. S. 651, 668; *Pacific Exp. Co. v. Seibert,* 142 U. S. 339; *Charlotte, C. & A. R. Co. v. Gibbes,* 142 U. S. 386; *Coulter v. Louisville & N. R. Co.* 196 U. S. 599; *American S. R. Co. v. Louisiana,* 179 U. S. 89; *Travellers' Ins. Co. v. Connecticut,* 185 U. S. 364; *Kidd v. Alabama,* 188 U. S. 730; *Savannah, T. & I. of H. R. Co. v. Savannah,* 198 U. S. 392; *People ex rel. Met. St. R. Co. v. Tax Comm'rs,* 199 U. S. 1; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 237; *Giozza v. Tiernan,* 148 U. S. 657; *Home Ins. Co. v. New York,* 134 U. S. 594; *Adams Exp. Co. v. Ohio State Auditor,* 165 U. S. 194; *Magoun v. Ill. T. & Sav. Bank,* 170 U. S. 283; *Billings v. Illinois,* 188 U. S. 97; *Merchants' & M. Bank v. Pennsylvania,* 167 U. S. 461; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150; *Clark v. Titusville,* 184 U. S. 329; *Maine v. Grand Trunk R. Co.* 142 U. S. 217; *Hagar v. Reclamation Dist.* 111 U. S. 701; *Connolly v. Union S. P. Co.* 184 U. S. 540; *Adams Exp. Co. v. Ohio State Auditor,* 17 Sup. Ct. 604; *New York v. Barker,* 179 U. S. 279; *Chamberlain v. Walter,* 60 Fed. 788. The decisions are to the same effect and without conflict in the state courts, some of

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which are: *State Board v. Central R. Co.* 48 N. J. Law, 146; *Comm. v. Edgerton C. Co.* 164 Pa. St. 284, 304; *Owensboro & N. R. Co. v. Daviess Co.* (Ky.) 3 S. W. 164; *Ames v. People,* 26 Colo. 83, 56 Pac. 656; *Dubuque v. C., D. & M. R. Co.* 47 Iowa, 196, 200; *Northern Pac. R. Co. v. Barnes,* 2 N. Dak. 310; *Missouri River, Ft. S. & G. R. Co. v. Morris,* 7 Kan. 210; *Central Iowa R. Co. v. Sup'rs,* 67 Iowa, 199; *Louisville & N. R. Co. v. Louisville* (Ky.) 29 S. W. 865; *Sawyer v. Dooley,* 21 Nev. 390; *State ex rel. K. C., St. J. & C. B. R. Co. v. Severance,* 55 Mo. 378; 1 Cooley, Taxation (3d ed.) 72, 77; 2 Elliott, Railroads, §§ 740 *et seq.* See, also, *Mich. Cent. R. Co. v. Powers,* 201 U. S. 245, affirming 138 Fed. 223. The power of the legislature to fix the situs of corporate property for taxation, even though it be in part real estate and thus subject to a different rate of taxation in a given district than it would be subjected to were it taxed in the place of its actual location, is established in this state. *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550; *State ex rel. Ashland W. Co. v. Wharton,* 115 Wis. 457. See *Travellers' Ins. Co. v. Connecticut,* 185 U. S. 364; *Kidd v. Alabama,* 188 U. S. 730. Ch. 315 is not invalid because sleeping-car companies and street railways are excluded from its provisions. Sleeping-car companies, while taxed under a different statute (ch. 112, Laws of 1899, as amended by ch. 477, Laws of 1905), are so taxed in the same manner as railroads in every respect, both as to the mode of ascertaining the value and the rate imposed, but if they were not, and were taxed under an entirely different system, the law would be valid. *Western U. Tel. Co. v. Indiana,* 165 U. S. 304; *Pacific Exp. Co. v. Seibert,* 142 U. S. 349, 354; *American S. R. Co. v. Louisiana,* 179 U. S. 95. Sleeping-car companies are not common carriers. *Pullman S. C. Co. v. Hatch* (Tex.) 70 S. W. 771; *Scaling v. Pullman's P. C. Co.* 24 Mo. App. 29, 32; *Pullman P. C. Co. v. Gaylord,* 9 Ky. Law Rep. 58. As to street railways, there is a wide difference

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between them and railroads taxed by the act in question, in the business carried on, in their organization and powers, and in practical operation. *Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co.* 107 Wis. 192. These two properties have been recognized as two distinct classes for purposes of taxation in every Wisconsin law on the subject. The street railways have been taxed under different rules and according to different methods, and such taxation was upheld in the case of *Milwaukee E. R. Co. v. Milwaukee,* 95 Wis. 42, 46. That the two properties constitute distinct classes for the purpose of taxation is not only the doctrine of the supreme court of Wisconsin, but that of the supreme court of the United States, as declared in the cases of *State ex rel. Met. St. R. Co. v. Tax Comm'rs,* 199 U. S. 1; *Savannah, T. & I. of H. R. Co. v. Savannah,* 198 U. S. 392; and *Michigan Railroad Tax Cases,* 138 Fed. 223, affirmed 201 U. S. 245. The provision of ch. 315 taxing railroad property at the average rate paid by the general property of the state is unobjectionable and valid. It is absolutely required that a rate be fixed, and there is no requirement of the constitution as to the manner in which it shall be fixed. While it was held in *Black v. State,* 113 Wis. 205, that the inheritance tax law of 1899 was invalid, for the reason that all property of the same class was not included, it was settled that the rate as to any class might be fixed by the legislature, regardless of the rate fixed on any other class of property. The position of counsel for appellant that property cannot be divided into classes, if taxed under the *ad valorem* system, is novel, and has no foundation in the authorities. See *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485; *Battles v. Doll,* 113 Wis. 357; *Mich. Cent. R. Co. v. Powers,* 138 Fed. 223; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421; *Fla. Cent. & P. R. Co. v. Reynolds,* 183 U. S. 471; *Coulter v. Louisville & N. R. Co.* 196 U. S. 599; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 142. The provision requiring the state board to determine

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the average rate of taxation is not a delegation of legislative power. *Board of Ed. v. State Board,* 133 Mich. 116; *State ex rel. Brown v. Mo. Pac. R. Co.* 92 Mo. 137; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 68; *Locke's Appeal,* 72 Pa. St. 491, 498; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 402; *In re Oliver,* 17 Wis. 681; *In re North Milwaukee,* 93 Wis. 616; *Dickson v. Racine,* 61 Wis. 545; *State ex rel. Baltzell v. Stewart,* 74 Wis. 620; *State ex rel. Ellis v. Thorne,* 112 Wis. 81; *Field v. Clark,* 143 U. S. 649. The law is well settled in this country that, in conferring power upon a railroad commission to determine and establish freight rates, there is no delegation of legislative authority. The legislature having prescribed that rates shall be reasonable, the duty of a state board in determining what a reasonable rate is, is the ascertainment of a fact only. It will not be contended that the very indefinite standard created by a legislature that railroad rates shall be reasonable involves the exercise of less discretion by a state board of railroad commissioners than the duty of the state board of assessment in the case at bar in arriving at the average rate of taxation. *State ex rel. R. & W. Comm. v. Chicago, M. & St. P. R. Co.* 38 Minn. 281; *State ex rel. Board of Transp. v. Fremont, E. & M. V. R. Co.* 22 Neb. 313; *People v. Harper,* 91 Ill. 357; *State ex rel. Godard v. Johnson,* 61 Kan. 803, 49 L. R. A. 662; *Georgia R. & B. Co. v. Railroad Comm'rs,* 70 Ga. 694; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. 641; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362; *St. Louis & S. F. R. Co. v. Gill,* 156 U. S. 649, 663; *Railroad Commission Cases,* 116 U. S. 307; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418; *Interstate Comm. Comm. v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479. Appellant is not entitled to a deduction from its assessments on account of its mortgage indebtedness. The doctrine of classification so well and conclusively established permits different rules for taxation of different classes of property. It certainly would permit the

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exclusion of debts in one case and the inclusion in the other. This would be so without reference to any difference between debts of railroad companies and those of individuals or other corporations. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Chester v. Pennsylvania,* 134 U. S. 240; *Jennings v. Coal Ridge I. & C. Co.* 147 U. S. 147; *Michigan Railroad Tax Cases,* 138 Fed. 223. There is besides, from an economic standpoint, a fundamental difference between debts of the one class and those of the other. Seligman, Essays in Taxation, 103; McCrea, Taxation of Transportation Companies, 9 U. S. Ind. Comm. Rep. (1901) 1035; *People ex rel. Thurber v. Barker,* 141 N. Y. 118; *People ex rel. Commercial C. Co. v. Morgan,* 178 N. Y. 443; *Central Pac. R. Co. v. State Board,* 60 Cal. 35; *Germania T. Co. v. San Francisco,* 128 Cal. 589. The validity of the tax imposed upon the appellant is not affected by the action of the local assessors in failing to consider franchise values of private corporations, and the good will of partnerships and individuals in making their assessments. Evidence of such facts was not admissible. Sec. 1063, Stats. 1898; *Plumer v. Marathon Co.* 46 Wis. 163, 179; *Marshall v. Benson,* 48 Wis. 558. Independently of statute, it would seem to be settled that an assessor cannot impeach his own assessment. *Coulter v. Louisville & N. R. Co.* 196 U. S. 599, 610; *Fayerweather v. Ritch,* 195 U. S. 276, 306, 307; *Missouri v. Dockery,* 191 U. S. 165. It is not competent even to prove admissions of an assessor. *Marshall v. Benson,* 48 Wis. 558, 563. Omission of property from taxation does not of itself constitute a ground for setting aside the tax. *Smith v. Smith,* 19 Wis. 615; *Hixon v. Oneida Co.* 82 Wis. 515; *Brauns v. Green Bay,* 55 Wis. 113; *Dean v. Gleason,* 16 Wis. 1; *Semple v. Langlade Co.* 75 Wis. 354; *Coulter v. Louisville & N. R. Co.* 196 U. S. 599; *Cummings v. National Bank,* 101 U. S. 153, 157; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421; *Sup'rs v. Stanley,* 105 U. S. 305; *New York v. Barker,* 179 U. S. 279; *Adams*

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Exp. Co. v. Ohio State Auditor, 165 U. S. 194; *Michigan Railroad Tax Cases,* 138 Fed. 223. The appellant comes into this court as a court of equity, and must show that the tax is not merely irregular but is inequitable. *Beaser v. Barber A. P. Co.* 120 Wis. 599; *Knapp v. Heller,* 32 Wis. 467; *Cook v. Racine,* 49 Wis. 243, 246; *Hixon v. Oneida Co.* 82 Wis. 515, 531; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606. Ch. 315 does not violate sec. 5, art. VIII, Const., which prescribes that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year. These taxes go into the general fund for the use of the state, and, though they are produced by state taxes, they are not such taxes as are contemplated by sec. 5. This tax is "one of the other sources of income" mentioned in the section, and if this source of income, together with the other sources, is not sufficient to provide for the needs of the state, then it is incumbent upon the legislature to comply with the constitution in levying an annual tax upon the general property of the state to meet the deficiency. But, if this should be regarded as an annual tax within the constitutional provision, it is not in any way in violation thereof. It must be conclusively presumed that the legislature has provided a sum no greater than it deemed sufficient to defray the expenditures of the state, and that the different sources of income which it has provided for are necessary to meet such estimated expenditures. Ch. 315 does not violate the XIVth amendment to the federal constitution. It has been repeatedly held by the supreme court of the United States that this amendment was not violated, if the law treated all property of a similar kind in the same way, discriminating against none, and gave to the owner an opportunity to be heard at some stage of the proceedings in which the tax was levied and assessed, so that it could not be said that his property was taken without due process of law. *Mich. Cent. R. Co. v. Powers,* 201 U. S. 245;

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Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; *State Railroad Tax Cases,* 92 U. S. 575, 611; *Home Ins. Co. v. New York,* 134 U. S. 594; *Magoun v. Ill. T. & S. Co.* 170 U. S. 283; *Merchants' & M. Bank v. Pennsylvania,* 167 U. S. 461; *Barbier v. Connolly,* 113 U. S. 27, 32; *Connolly v. Union S. P. Co.* 184 U. S. 540, 559; *Billings v. Illinois,* 188 U. S. 97, 102; *People ex rel. Met. St. R. Co. v. Tax Comm'rs,* 199 U. S. 1; *Savannah, T. & I. of H. R. Co. v. Savannah,* 198 U. S. 392; *Spencer v. Merchant,* 125 U. S. 345; *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Davidson v. New Orleans,* 96 U. S. 97, 107. This law provides for ample notice to the taxpayer. *Hennessy v. Douglas Co.* 99 Wis. 129; *Dietz v. Neenah,* 91 Wis. 422.

MARSHALL, J. It does not seem practicable nor advisable to attempt to arrange the multitude of propositions submitted by the eminent counsel, who have contributed to lighten our labors in this important case, so as to treat all of them in detail and in logical order. It is not out of place to say, at the outset, that the careful preparation of the case for our consideration on the part of appellant merits the highest commendation, and that such preparation on the part of respondents is meritorious as well. It is gratifying to members of the court to have those whose duty it is to co-operate with them, in the administration of justice, evince proper appreciation of the dignity of important questions to be solved, and their duty in respect thereto. Most especially is that so when questions of such supreme importance as those before us are involved; questions as far reaching, as to the welfare of the people throughout the state and interests of great magnitude to the parties immediately concerned, as any that have been heretofore decided by this court. It is due to counsel to say that they merit the distinction of having fully appreciated such far-reaching importance of this litigation and so risen to the occasion that they may well rest satisfied of having

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legitimately laid the full responsibility for the result upon those who must assume it.

As said before, it does not seem best to attempt to treat in detail all the major, and minor questions as well, drawn to our attention by counsel. All may well be grouped under a few grand divisions, as it were, and thus viewed more understandingly than in any other way. The first one in order relates to the scope and meaning of sec. 1, art. VIII, of the constitution.

I.

It seems quite unaccountable, after the lapse of nearly sixty years since the constitution was framed, and half a century since that feature of the article in question was first considered by this court, notwithstanding the seemingly clear decision then made on the point at that time primarily involved, followed soon thereafter by a second decision covering the precise matter now in hand, that we should find ourselves at this late day face to face with a controversy as to the precise meaning of the words of our organic law: "The rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe." That language seems plain, this court, as we shall see, early said it was very plain, and yet it has been treated time and again as ambiguous, and still seems to be so regarded, notwithstanding all that this court has in fifty years said on the subject. And so it must be regarded, especially since men of the highest attainments, lawyers, jurists, and learned laymen, have read different meanings out of it, having regard, as it has been thought, to the object of state constitutions and the broad powers possessed by the people, unrestrained by a charter on the subject. No better object-lesson, perhaps, could well be presented to illustrate the rule that ambiguity requiring judicial construction may as well arise through the apparent consequences of applying words in their literal sense to the sub-

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ject with which they deal as from uncertainty of sense in the words themselves, than by the matter in hand. By such application, especially in the light of the varying views entertained of what this court has decided, the words of the constitution speak one way, seemingly, to some and another way to others. It is to be hoped that by the treatment of the subject in the three cases now before us all obscurities may be cleared up.

The following propositions may be stated as covering all questions that have arisen under the section in question:

(1) Did the fathers of the constitution intend, by sec. 1, art. VIII, thereof, that all taxes on account of property should be direct thereon, the owners being obligated to pay because of ownership, but the taxes to be in form as though the property were to pay the tax?

(2) Did they intend that all property should be taxed, and taxed equally so far as practicable?

(3) Did they design, by such section, to deal with any other form of taxation than that on property?

(4) Did they intend that all property taxed should be affected by the taxing burden equally so far as practicable, there being but one rule applying equally so far as practicable to each member of the one class, as contradistinguished from several rules for as many classes, the rule of uniformity being satisfied by uniformity within each class?

(5) Did they contemplate the establishment of a legislative rule for the taxation of property that should be uniform in that it should bear as equally as practicable on every species of property prescribed for taxation, and each member of each such species?

(6) What is meant by the rule of property taxation which the constitution requires to be uniform?

(a, b) The first proposition is ruled in the affirmative, and the second in the negative, by the repeated decisions of this court: they are not now in controversy. *Milwaukee & M. R.*

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Co. v. Waukesha Co. 9 Wis. 431, note; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833; *State v. Railway Cos., ante,* p. 449, 108 N. W. 594, and *Nunnemacher v. State,* 129 Wis. ——, 108 N. W. 627. There may be privilege taxes, as indicated in the cited cases, for revenue only, such as taxes on the business of insurance companies, and the former system of railway license taxation; there may be regulation taxes, with incidental revenue features, or for revenue only, such as the inheritance taxes; there may be license taxes for police purposes only, or for such purposes primarily with incidental revenue features, as to subjects within the field of police regulations. None of such taxes fall within the provisions of sec. 1, art. VIII, of the constitution, though they are, of course, under the limitations of other equality clauses of the constitution and the XIVth amendment of the federal constitution.

(c) The third proposition, it would seem, has been quite as decisively settled in the negative, by a long line of decisions commencing with *Milwaukee & M. R. Co. v. Waukesha Co., supra,* as held in the cases decided herewith. The first case went, in the main, as we shall show, upon the ground that the tax was not one on property within the meaning of the constitution, but was an exaction in lieu of such taxation. The mistake subsequently made, at times, of speaking of a tax of a sort other than one on property, but in lieu thereof, as a tax on property, seems so plain that the wonder is that any such process of reasoning could have been indulged in. Privilege taxes elsewhere, under constitutional provisions similar to ours, have been uniformly held not to be taxes on property, and so not to be tested by such provisions when otherwise they would be condemned under the requirement that taxation of property shall be laid by a uniform rule, or on a rule of equality. The constitution of South Carolina provides that taxes on property shall be uniform, and it has been held that it refers only to such taxes as are

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commonly understood to be direct on property, not to any other form of taxing the same, though it, in the ultimate, reaches the property and in both cases the owner must make the payment. *Charlotte, C. & A. R. Co. v. Gibbes,* 27 S. C. 385, 4 S. E. 49. The same court held that in all cases where taxes are assessed on property they fall under the constitutional rule of uniformity. *State v. Hayne,* 4 S. C. 403. The constitution of Alabama contains a similar provision, and thereunder it is held that it is referable only to direct property taxation and is not a limitation upon any other form of taxation. *Capital City W. Co. v. Board of Revenue,* 117 Ala. 303, 23 South. 970. Such holdings in large numbers, under similar constitutional provisions, might be given, but we will cite only the following few additional cases: *Jersey City G. L. Co. v. United G. I. Co.* 46 Fed. 264; *Standard U. C. Co. v. Att'y Gen.* 46 N. J. Eq. 270, 19 Atl. 733; *State v. State Board of Assessors,* 47 N. J. Law, 36; *Union T. Co. v. Wayne Probate Judge,* 125 Mich. 487, 84 N. W. 1101; *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361; *Delaware Railroad Tax,* 18 Wall. 206; *Comm. v. Provident Inst.* 12 Allen, 312; *Coite v. Society for Savings,* 32 Conn. 173. Consideration of this branch of the case might be carried to a very great length by referring to the numerous state constitutions and decisions under them, but we shall forego saying more on that line than to record that from a careful review of the entire field it is our conclusion that the term "tax on property," and similar expressions in such constitutions, has been uniformly held to stand for what such term is commonly understood to signify.

It is useless to press upon the attention of courts, as is often done, the idea that all taxes are really on the owners of property, either because of such ownership alone or the use of the property, in some way, so that in practical effect whatever be the form of the tax, let it be direct or indirect, in the ultimate it is on the property respecting the real basis

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thereof and on the person respecting the instrument that must necessarily discharge it, and that regardless of the form, the mere shadow of the matter, in substance the exaction should be regarded as a tax on property. All such methods of reasoning, however philosophical they may appear to be, have been met over and over again by the courts with the uniform result that the term "taxes on property," as used in the organic law, means taxes on things tangible or intangible, as distinguished from taxation on the right to use or transfer things, or on the proceeds of business in which the use of things is essential, and that is because such meaning is the common, ordinary meaning and so the one which, nothing appearing to the contrary, it must be presumed was intended in framing the constitutional provision. We will not further pursue this subject, since it is more distinctly involved in *Nunnemacher v. State,* 129 Wis. ——, 108 N. W. 627, and the position of the court has been there so clearly stated by our brother WINSLOW that it is thought there will be no need in the future to rediscuss the matter.

(d) The fourth proposition suggested is the one of greatest significance, in view of the reasons which moved the learned court to pronounce the judgment complained of, and the attitude of counsel in respect thereto. The former held that the constitutional requirement that property shall be taxed by a uniform rule does not mean that all taxes on property shall be at a uniform rate and by one rule; that there may be classification, and that the rule of uniformity is satisfied by uniformity within each class. That idea is the real basis upon which the judgment complained of was rendered. In a very elaborate opinion the circuit judge marshaled many decisions of this court supposed to support it.

While it did not appear, upon the oral argument, that the trial court's theory, as indicated, was relied upon with any great degree of confidence by counsel for the state, we find by their brief that they do not by any means intend to treat

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it with indifference. They stand for it with such apparent confidence as to require, if anything other than the trial court's laborious opinion were necessary, careful consideration thereof. If the trial court's position be sound it would certainly be very difficult to escape, if it could be done at all, the conclusion that the judgment appealed from is right.

Counsel for appellant contend that the doctrine that uniformity within each of several classes of property satisfies the calls of an equality provision in a state constitution dealing with the subject has no application to such a constitutional provision as ours; that the only classification permissible thereunder is the separation of property into that to be taxed and that not to be taxed, and such subclassification of the former as may be reasonable, having regard to methods of applying the one rule of uniformity to the one general class so as to work out, as to all, equality so far as practicable.

The trial court started with the idea that this court, in *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431, decided in 1855, which for convenience we will call the first case, adopted the doctrine that classification of property for direct taxation: for the application of different rules to different classes, is legitimate. The basic question there, as we shall see, was whether the railway license taxing law of 1854 was one imposing taxes on property within the meaning of the constitution. The result, in effect, was that if it were such a law it satisfied the rule of uniformity, since the taxes imposed were made uniform as to all property of the class, but that it was not a law taxing property. Here is the way the decision was phrased, the propositions being numbered for convenience of future reference in this opinion:

(1) The imposition upon railroad property by the act of 1854 does not violate that provision of the constitution of Wisconsin which provides a uniform rule of taxation, provided like property pertaining to railroads, or all property of that class, is alike taxed or alike exempt, as it appears to be.

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(2) But the court does not think that the law of 1854 does impose a tax within the meaning of the constitutional provisions, and therefore the law of 1854 is valid, so far at least as the government is concerned.

It is quite unmistakable, from the phrasing of the decision, that the first proposition was not necessarily decided, since the final conclusion was that the constitutional provision was not involved. However, the unnecessary conclusion was judicial; it was the law for that case and a rule for the future under the doctrine of *stare decisis,* so long as it stood. So the trial court, in tracing the judicial history of the matter, made a well-grounded commencement.

In *Knowlton v. Rock Co.* 9 Wis. 410, which for convenience we will hereafter generally refer to as the second case, the question as to whether the constitution permits classification of property for the purposes of applying different rules of taxation was presented for decision. The circumstance giving rise thereto was the existence of a law providing that, in levying taxes in the city of Janesville, farming lands situated within its boundaries should not be burdened to the extent of the burdens on other property of equal value. The tax on such farming lands was limited to one half of one per cent. for current expenses, for the maintenance of roads and bridges and for the support of the poor, and not more than one half that levied on other property, and for all other purposes such lands were entirely exempted. The decision of the court, Justices Dixon and Paine concurring, was that the law was invalid because (reciting from the syllabus, which is an accurate epitome of the opinion) "the constitution has fixed one unbending uniform rule of taxation for the state, and property cannot be classified and taxed as classed by different rules. The provision of the constitution that taxes shall be levied upon such property as the legislature shall direct does not sanction a discrimination which provides for taxing a particular kind of property for the support of gov-

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ernment by a different rule from that by which other property is taxed; for when the kind of property is prescribed the rule of taxation must be uniform. All kinds of property must be taxed uniformly or be absolutely exempt." That is, certainly, no less emphatic than the language used by the chief justice in his opinion, as the following will show: "There can be no medium ground between absolute exemption and uniform taxation." The theory advanced would permit "different rules of taxation to the number of which there is no limit except that fixed by the legislative discretion, while the constitution established but one fixed, unbending, uniform rule upon the subject." If such theory is adopted "it will afford a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that there will not be found an apologist anywhere, at least outside of those who are recipients of its favors." The mandate of the constitution, "it is true, is very brief, but long enough for all practical purposes, long enough to embrace within it clearly and concisely the doctrine which the framers of the constitution intended, that of equality. The rule of taxation shall be uniform, that is to say . . . it shall in all cases be alike; the valuation must be uniform, the rate must be uniform." "Uniformity . . . becomes equality. There can be no uniform rule, which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government within and for which the tax is to be raised." That doctrine, so vigorously proclaimed, has never been overruled or criticised or even supposed to be open to question in this court so far as we are aware.

It will be seen that the second case overruled most distinctly the conclusion unnecessarily made in the first case. The full scope of the former decision was not definitely known, because the written evidence thereof was not then

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at hand. A full history of that is given in *State v. Railway Cos., ante,* p. 449, 108 N. W. 594. No attempt to overrule the ultimate conclusion reached in the first case, or occasion therefor, existed, because of the fact, as said in the court's opinion, that the understanding was, as was the fact, that it did not involve the taxing power under sec. 1, art. VIII.

Justice COLE dissented, being more impressed, as plainly appears from his dissenting opinion, with the former conclusion unnecessarily reached than by the dominant one that the case did not fall under the constitutional provision. He evidently was of the opinion that property could be classified for different rules of *ad valorem* taxation, and that the court so formerly decided. Manifestly, the first case did not involve a direct tax on property, and the second had no necessary or logical connection with the first, except in that case the two forms of taxation were confused somewhat, when only one was referable to sec. 1, art. VIII, of the constitution.

The circuit judge further reasoned that the questions in the *Knowlton Case* were again passed upon in *State ex rel. Att'y Gen. v. Winnebago Lake & F. R. P. R. Co.* 11 Wis. 35, which we will call the third case, it again being held that in the first case the conclusion was that property could be classified legitimately for different rates or rules of taxation. In this third case the source of disquieting differences as to the matters in the first decision is very clearly stated. This language of Justice PAINE as to the attitude of the court in the second case and Justice COLE's then remembrance of the first is significant:

"It was there said that the court held (1) that the amount required to be paid by the railway company was not a tax, (2) that if it was a tax the constitutional requirement of uniformity was complied with, inasmuch as all railroads were taxed alike. Mr. Justice COLE, however, who was then on the bench, placed his decision upon the last ground, and does not understand that the court relied very strongly upon the first."

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It should be observed that the order of the decision was reversed in Justice PAINE's statement; a circumstance, however, emphatically indicating what he and Chief Justice DIXON regarded as the turning matter in the first case. The written decision, under the hand of Justice SMITH, when recovered, showed very distinctly that the dominant, the governing, idea, at least with Chief Justice WHITON and Justice SMITH, was the one that Justice COLE so thought, years after the decision was rendered, was not "very strongly relied on." Only by adhering closely to the dominant idea of the first case, as evidently viewed by the majority of the court then and thereafter, and that in the second as so viewed, laying aside expressions in dissenting opinions, can this matter be set at rest.

When we speak of the first proposition in the first case as having been unnecessarily decided, we do not mean that the solution of that alone would not have, effectually, disposed of the case; but it would not have so terminated the litigation as to settle the controversy as to whether the tax in question was one referable to sec. 1, art. VIII, of the constitution, which was the basic matter of dispute.

Now, while the second case involved the question only subjunctively decided in the first case, and not the one necessarily decided at all, the third involved subjunctively the question necessarily decided in the second case, and necessarily the turning question in the first. That is, while the first case dealt with a privilege tax, not a tax on property within the meaning of the constitution, the second dealt with the latter, not with the former; and the third dealt with the one, but not with the other,—a tax on property. The decision in the third, so far as the second overruled the decision subjunctively made in the first case, followed it as hypothetically necessary to the result reached, and as to the matter necessarily decided in the second case it was subjunctively affirmed, and as to the turning question in the first decision,

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in the latter it was overruled. Thus, the second was left reaffirmed as to there being no room under the constitution for classification of property for different rules or rates of taxation, and the first was left wholly overruled. Justice COLE preserved consistency in his record by adhering to his former view that classification of property for taxation by different rules or rates is legitimate. He stood alone on that at first, as it seems, as he did in the second and the third cases.

It is suggested that when the matter was presented to this court later, in *Kneeland v. Milwaukee,* 15 Wis. 454, which we will designate as the fourth case, Justices DIXON and PAINE receded from their position in the second and third cases on all points and indorsed the views of Justice COLE, restoring to full validity the decision in such first case, both on the question there subjunctively decided and the one necessarily determined, and also indorsed the views of Justice COLE as to the point necessarily decided in the second case as well. That is plainly a mistake. In the last opinion filed, the one which rehabilitated, so to speak, the decision in the first case, Justice PAINE prefaced the final conclusion reached by stating as the understanding of the court that a difference had existed as to what was decided in the first case, in that while the final writing under the hand of Justice SMITH showed that the court held that the law of 1854 did not "impose a tax within the meaning of the constitutional provision," Justice COLE's remembrance was that the court did not hold that the law "did not impose a tax in the just and proper sense," "but," said Justice PAINE, "the difference is wholly immaterial inasmuch as both statements show the court held that even if it was a tax it was no violation of the rule of uniformity; both show that the law was decided to be no violation of the constitution. This is all that is material for us to know in giving effect to the decision as an authority requiring us to sustain the validity of the law, *and that is all the effect we give to it.*" In that, by necessary implication, there

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is a distinct negation of any intention to overrule anything said in the second case or the third, or anything said in the opinions on the first two hearings in the fourth, except as was necessary to so far restore the decision in the first as to recognize as valid the law of 1854. That covered the point, and that only, as to the law not being referable to sec. 1, art. VIII, of the constitution, because it "did not impose a tax within the meaning of the constitutional provisions." The point subjunctively decided in the first case, and overruled in the second, was plainly left where the second case left it, namely, that there can be no classification for different rules of taxation under sec. 1, art. VIII, of the constitution.

Following along the mistaken line we have indicated as having been taken by the circuit court and maintained by counsel for respondent, it is suggested that this court, in distinctly affirming the *Knowlton Case* in *Hale v. Kenosha,* 29 Wis. 599, overlooked the fact that the former was expressly repudiated in the *Kneeland Case.* Instead of such repudiation there was the most emphatic affirmance thereof, as we have seen, as to the question under consideration here. So the fifth case, on that, is in perfect harmony with the dominant, with the ruling, feature of the second. It is hardly reasonable to suppose that the justices concerned in making so important a decision as that in the second case where they divided, finally united in overruling it in the fourth, and, so soon as the fifth case was decided, united in going back to the position taken in the second and concurred in reinstating it and re-intrenching it in a most decided manner.

The sixth case in order is *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833. It is referred to apparently as finally intrenching in our system the idea of classification of property for taxation of it by varying rules, in a subsidiary sense. That seems to be based in part on the very accurate history there given of the treatment, here, of the railway license tax law, dignifying the first decision as regards points

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there *"necessarily decided"* as the law of this state, and stamping as *"mere dicta"* all said subsequently inconsistent with "what was so necessarily decided." It also seems to be based, in part, on some general discussion of the subject of classification leading up to the decision of the real question at issue, not involving the subject of controversy here.

When what was said in the sixth case is considered in the proper light, it will be seen to be in harmony with the point necessarily decided in the *Kneeland Case* as well as the one necessarily decided in the first case, leaving the position of this court as to what was necessarily decided in both where it had stood for twenty years or more. The only subject involved was that of the power of the legislature to exempt some property from taxation and tax other property. The power, generally speaking, was not in controversy. The contention was as to whether it extended so far as to permit subdivision of property of the same general class so as to tax part and exempt the rest. No question of the classification of property for the purpose of applying thereto different rates or rules as regards equality of burden of taxation was suggested. The court held, under the peculiar circumstances of the case, Justice Orton dissenting, that there could be such classification. The land in question was in the nature of trust property for public purposes. It had been formerly held by the state, and was then necessarily exempt. Although transferred to the railway company in execution of the trust, it was held that its trust character was not so wholly changed but what it might be still exempted in further execution of the trust. The situation was peculiar, as indicated, the decision was expressly confined thereto, and it has never been extended.

One should not be misled by the course of the discussion in the sixth case, by reason of citations justifying classification, dealing only with different methods of applying the same rule or rate of taxation to all property so as to effect equality,

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so far as practicable, such as *Missouri River, Ft. S. & G. R. Co. v. Morris,* 7 Kan. 210; *Louisville & N. A. R. Co. v. State,* 25 Ind. 177, and the like; nor citations justifying classification for exempting property from general taxation and imposing in lieu thereof a privilege tax, such as *Portland v. Portland W. Co.* 67 Me. 135; *Kittanning C. Co. v. Comm.* 79 Pa. St. 100, and the like; nor such as were shown to justify classification for police regulation, such as *Youngblood v. Sexton,* 32 Mich. 406, and the like; nor those relating to constitutions expressly or impliedly providing or permitting classification for purposes of taxation, and only requiring uniformity within each class, such as *New Orleans v. Kaufman,* 29 La. Ann. 283; *Kittanning C. Co. v. Comm., supra,* and the like,—many constitutions differ from ours in that important particular; nor those dealing with classification by exempting from general taxation and imposing contract taxes, such as *People ex rel. St. Mary's Falls S. C. Co. v. Auditor General,* 7 Mich. 84; or referring to mere manner of and situs for taxation, such as *State v. Runyon,* 41 N. J. Law, 98. All such should be read with reference to the particular questions and conditions involved in them respectively, and the question under discussion in the *Wisconsin Central R. Co. Case,* that of whether property may be classified as between property to be taxed and property not to be taxed.

As to the four previous decisions of this court, ending with the *Kneeland Case,* it was said in the sixth case, as seen, that the decision in the third "was overruled and all points *necessarily decided* by the affirmance of the order in the first case were followed," and thereby that all the court's "utterances inconsistent with the points *so 'necessarily decided'* by the united court November 17, 1855, became henceforth as mere *dicta.*"

While the quoted language brought into clearer light than existed before the validity of the first decision, since what was said was not accompanied by a plain statement of what

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points were, in fact, *"necessarily decided in the first case,"* perhaps the way was left open for a claim that the first of such points, indicated in the written decision under the hand of Justice SMITH, was one, and perhaps the dominant one, as had been claimed by Justice COLE, but which the court, as we have shown, had in effect held was not. That this court did not regard it as such in the sixth case seems plain, from the fact that neither the second case nor the fifth was even criticised.

There is nothing in *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 396, or *Battles v. Doll,* 113 Wis. 357, 89 N. W. 187, or *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468, inconsistent with the foregoing. Rightly considered, they do not deal with the subject here in hand at all. The first two concerned the matter of creating taxing districts and the last the subject of police regulation governed solely by other equality clauses of our constitution than sec. 1, art. VIII, and by the XIVth amendment to the federal constitution, which permit classification. True, it is there said that the taxation of railroad companies upon gross earnings is a mode of levying taxes upon the property of the corporation, and the idea of classification is treated in that connection as indicated thereby. But a *mode* of taxing property, as certainly all indirect methods are, is not taxing of property.

We do not overlook the circumstance that in *State v. Whitcom,* after referring to the constitutional limitation for the taxation of property (sec. 1, art. VIII, Const.), and following that with language to the effect that on the exercise of the police power there are like equality limitations, citing sec. 1, art. I, of the state constitution and the XIVth amendment to the national constitution, this was said:

"Such command does not require that all property or all persons shall be treated exactly alike, but permits separation of either into classes of property or of persons similarly conditioned or situated, having characteristics legitimately dis-

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tinguishing the members of one class from those of another in respects germane to such general and public purpose and object of the particular legislation."

If one were to follow the line of thought which the learned circuit judge did from the beginning, one would be quite liable to view the above quoted language as recognizing a classification of property for direct taxation by rules, uniform as to each class, under sec. 1, art. VIII, as legitimate. Without special reference to such language, the effort here to clear up obscurities as regards the constitutional provision would be incomplete; not because there is obscurity in fact in such language, rightly viewed, but because of the tendency, as we have seen, not to rightly view it. The court did not intend thereby to indorse the doctrine of classification of property for direct taxation with reference to uniformity merely within each class. It had no thought of overruling or saying anything inconsistent with the *Knowlton Case* or the *Hale Case* on that subject. The term "classification of property" was used, as was thought, with reference to such as had been uniformly recognized in this state as proper: division of property into that to be taxed and that not to be taxed at all; division of that to be taxed and that not to be taxed within the meaning of sec. 1, art. VIII, of the constitution, but taxed indirectly; division of property to be taxed directly, and so referable to sec. 1, art. VIII, into classes with reference to situs and in other respects, in aid of applying one rule to all so as to affect the different kinds of property with as great a degree of equality as to all as practicable. Classification for different rules resulting in different rates and unequal taxation, in that one class might not be made to bear the public burdens proportionately with other classes, was not thought of, and the case should not be regarded otherwise. The language was carefully and appropriately chosen in respect to the point to be decided. Read with reference to the settled law, it is in perfect harmony therewith. Read with refer-

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ence to the line of thought upon which the judgment was based, candor compels us to say it would appear consistent therewith.

In discussing questions in a legal opinion leading up to a final result as to some particular controversy, one can hardly be expected to so guard everything written but that another may, readily, mistakenly misapply it, viewing the same without accurate appreciation of its particular bearing in the given case.

The foregoing covers the entire process of reasoning by which the result was reached below that in this state there may be classification of property for different rules and consequently different rates of taxation. The start was not wholly illegitimate, but the force and scope of the intervening decisions was not appreciated, and a wrong conclusion was the result. If the judgment depended upon such process of reasoning for its support a conclusion that it is erroneous would be most likely to follow.

Before passing from this subject we should refer to *Slauson v. Racine,* 13 Wis. 398, which was not noticed in its order of date, because it was thought best to treat, throughout, the line pursued by the trial court and counsel for respondent. In the *Slauson Case* the precise question was presented treated before and after, as will be seen. The law under consideration classified property for taxation as regards whether agricultural lands within the city limits of Racine or other lands therein. It was construed as unconstitutional, Justice Cole, consistent with his position on numerous other occasions, dissenting upon the ground that classification of property for taxation under sec. 1, art. VIII, was permissible. The court referred to the previous occasions of so deciding, and Justice Cole to the previous occasions of his dissenting from the views of his brethren.

To recapitulate briefly: For the direct method of taxing property, taxation on property so called, as to the rule of uni-

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formity, there can be but one constitutional class. All not included therein must be absolutely exempt from such taxation. All within such class must be taxed on a basis of equality so far as practicable. In that respect *Knowlton v. Rock Co.* and *Hale v. Kenosha* are, and have been since they were decided, the doctrine of this court. *Expressio unius est exclusio alterius* does not apply to sec. 1, art. VIII, of the constitution so as to limit the taxing power of the state exclusively to property, since when the provision is read in connection with its history as found in the journal of the constitutional convention it is not ambiguous in that regard. Whatever limitations there are on other forms of taxation than that on property must be found in other equality clauses of the constitution than the one under consideration. For the direct method, the constitution puts all property chosen therefor into one class, leaving all other property outside thereof, and contemplates one rule and, so far as practicable, one rate of taxation, as said in the *Kneeland Case.* Privilege taxes, though indirect taxes on property, are not taxation of property, and so are not referable to sec. 1, art. VIII, of the constitution. For the clear understanding thereof looking to the words themselves, one, with the common meaning of the term "taxation of property" in mind, should read such words as suggested in the *Wisconsin Central R. Co. Case,* namely: "The rule of taxation shall be uniform . . . upon such property as the legislature shall prescribe." The court in the *Knowlton Case* said that those words are perfectly plain, but if there were any doubt about the matter, the history thereof found in the journal of the constitutional convention would strongly aid in removing it, in harmony with the position of this court, early most decidedly taken, as we have indicated, and since consistently maintained.

(e) The next stated proposition, in short, is: Does the constitution contemplate that the legislature shall make the rule

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of taxation, limited by the requirement as to uniformity? The answer to that will be a long step towards solving the last proposition.

This last subject has fallen into some little, though not serious, confusion. It may be helpful to briefly state the history of it as treated in the constitutional convention. That history is short. The proceedings entire, as to art. VIII, occurred during an hour or two's time at one sitting of the committee of the whole, and about the same length of time during one forenoon session of the convention. They are reported on about seven pages of the official journal, and that part relating to the particular matter on about four.

The subject was taken up in committee of the whole as it came from the committee which framed the article, there having been no discussion in the meantime, in this form: "All taxes levied in this state shall be as nearly equal as may be." Probably if no change had been made therein it would be said, at once, that the "rule of taxation" is to be found in the constitution itself, only requiring action on the part of the legislature to give it vitality. After brief discussion as to the second section of art. VIII dealing with the subject of exemptions, it was agreed to report the second clause of the first section as it now stands, evidently supposing that would leave the matter wholly to the legislature as to what property should be taxed and what should not be taxed. It was then agreed, substantially without debate, to recommend substituting the word "practicable" for the words "may be." Next it was agreed to recommend striking out the section on exemptions: that being done apparently because such section would be rendered useless by adopting the proposed second clause for the first section. Then, without debate, the first clause of the section as we now have it was agreed to as a substitute for the words "All taxes levied in this state shall be as nearly equal as practicable." After some further discussion and effort to reverse the action as to omitting the sub-

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ject of exemptions, it was agreed to report the article with the subject in hand covered as indicated, namely, "The rule of taxation shall be uniform throughout the state, and taxes shall be levied on such property as the legislature shall prescribe."

On the succeeding day, as before indicated, after brief proceedings, all recommendations of the committee of the whole were adopted. The article was then ordered engrossed. Without further change it was adopted and sent to the committee on revision, by recommendation of which the words "throughout the state" were stricken out.

When the report of the committee of the whole was acted upon by the convention, renewed efforts were made to add a section on the subject of exemptions, but the convention persisted in leaving the whole matter to the legislature under the second clause of sec. 1. It was during the discussion on this subject that the convention was admonished that the completed work, in case of its specifying property for taxation and property to be exempt from taxation, would be construed by the rule, *expressio unius est exclusio alterius.* Likewise on the floor of the convention several unsuccessful efforts were made to change the first section in the following order and form:

(a) All taxes levied in this state shall be uniform and equal and shall be assessed upon a just value of real and personal property.

(b) All taxes to be levied in this state shall be levied upon all property, both real and personal, according to value.

Thus it will be seen that the convention considerately refrained from tying the hands of the legislature in art. VIII as to any sort of taxation except that on property, or from placing any limit on legislative power as to what particular property to tax or exempt from taxation, or from even specifying, expressly, whether property taxation should be according to valuation. It is quite evident, however, that these two

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ideas were at the start intended to be covered by the language of the first section: (a) all taxes shall be on a basis of equality throughout the state; (b) all taxation of property shall be according to value.

During the brief debates the two ideas suggested were voiced time and again, expressly or impliedly, and were universally conceded, as is indicated by expressions used, to be necessarily fundamental. Nevertheless, it would seem that the rule of taxation, so called, was not in the end so definitely and exclusively confined to the constitution, itself, as at first.

The idea is not without reason that, notwithstanding the entire change in language of what became, by the first amendment, the first clause of sec. 1, there was no purpose to change the meaning. The better view, it seems, is that the final adoption of a clause so materially differing from that at first proposed, and the rejection of an expression, modeled after a form used for a similar purpose in many constitutions, was not wholly the result of a mere choice of words to express the one purpose in mind. If the only idea was to make the section as concise as practicable, such an adept in that line as Justice WHITON would have phrased the matter something like this: "Taxation shall be uniform on such property as the legislature shall prescribe," thus cutting the number of words down one third.

It will be noticed that the second clause of sec. 1 was added and the first perfected by the substitution of the word "practicable" before the first clause as we now have it was substituted for the original. Obviously, in the beginning the section referred to all taxation. It covered value as a basis where only value was usable, and other bases to fit the necessities or proprieties of each case. But when the second clause was added, it impliedly prescribed value as the basis, since, as said by Justice BREWER in *Cleveland, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 439, 14 Sup. Ct. 1122, "the rule of property taxation is that the property is the basis of taxation.

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It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon value." The same idea was pretty clearly expressed in *Knowlton v. Rock Co.* 9 Wis. 410.

The idea of taxation on a value basis being necessarily embodied in the second clause of sec. 1, all that was necessary to the first was the idea of uniformity. If it had been intended therein to confine the "rule of taxation" in its broader sense to the constitution, the first clause would have been changed so as to merely express the idea, "Taxation shall be uniform on such property," etc. The use of the significant, the peculiar language, "The rule of taxation shall be uniform," etc., suggests, to some extent at least, the making of a rule in conformity with the constitution, and not wholly by the organic law itself, as is commonly done. Had the latter idea been in mind there were plenty of models at hand, as, for example, that adopted in Michigan and several other states, "The legislature shall provide a uniform rule of taxation" or "uniform and equal rate of taxation;" and that adopted in Pennsylvania, Missouri and other states, taxation "shall be uniform," etc.; and that adopted in other states, taxation "shall be uniform," etc., and by "the fair market value;" and more concise still, that adopted in Virginia and other states, taxation shall be "equal and uniform;" and that in Ohio, taxation of property shall be "according to its true value in money."

So, looking at the matter as an original proposition, it would seem that the basic idea of the rule of taxation, the real principle thereof, was placed in the constitution. It expressed this: All taxation on property, as near as practicable, shall bear thereon, relatively equally as to value, throughout the state. To that extent we are to look to the constitution, itself, for the "rule of taxation." But in a broad sense, in that which gives vitality to the basic principle, it was left to the legislature to make the rule; no legislation to be deemed

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a part thereof, strictly speaking, except that essential to such vitality. The body of the rule was made by the organic law, it was left to the legislature to breathe into it the breath of life.

True, it might well be said that the foregoing is not in entire accord with all the previous expressions of this court on the subject. When we look to *Knowlton v. Rock Co.* it would seem that the first idea here was that the constitution solely prescribes the rule, and the legislature solely prescribes the property to which the rule shall be applied. Chief Justice DIXON, for the court, there spoke of "the rule of uniformity prescribed by the constitution." He summed the matter up thus: "The very moment that the legislature say that a specific article . . . of property shall be taxed . . . from that very moment the first clause of the section takes effect, and it must be taxed by the uniform rule. The legislature only can prescribe," then "the first clause of the section governs the residue of the proceeding."

True, the court suggested, on the occasion referred to, that the term "the rule of taxation shall be uniform" means "the course or mode of proceeding in levying or laying taxes shall be uniform, that it shall in all cases be alike, each step uniform." Manifestly, however, it was not intended to say that every detail as to all kinds of property under all sorts of conditions must be the same. That would be an impossibility; it has never been attempted, here or elsewhere. Practical construction of the constitution from the time it was adopted, common sense, and all authority is to the contrary.

Our taxing laws are not now, and never have been, uniform as to mere methods of imposing taxes. Property of the same general class is, and generally has been, taxed under some circumstances where the same is located, under others where the owner resides or has his principal office in this state, and under still others where his agent is located therein; some kinds of movables of a tangible character are taxed

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where the owner resides, while other kinds of such movables are taxed where they are located, or in use, notwithstanding the owner resides in this state; in some cases property of the same general class is divided, part being taxed where located on the 1st day of April in the year the tax is levied, and part where located on the 1st day of May in such year. There are many other instances that might be given of radical differences in treating different kinds of property, and different parts of the same general class, none of which have ever been supposed to violate the constitutional rule of uniformity. All have been supposed to be valid so long as they were uniform within the general or subclass and reasonably calculated to promote the constitutional object as to the whole. *State ex rel. Holt L. Co. v. Bellew,* 86 Wis. 189, 196, 56 N. W. 782; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 568, 63 N. W. 746; *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 137, 15 N. W. 121.

The language in the *Knowlton Case* was doubtless used with reference to matters so closely connected with the real principle of the rule as to necessarily be a part thereof. That is evinced by the explanatory clause with which the language as to the proceedings being required to be uniform was closed, namely, "the valuation must be uniform, the rate must be uniform." In *Hale v. Kenosha,* 29 Wis. 599, the idea that the constitution makes the rule was somewhat emphasized in that, without reference to details of imposing taxes, the language of the *Knowlton Case,* that "the legislature only can prescribe the subject of taxation, and then the first clause of sec. 1, art. VIII, takes hold and governs the rest of the proceeding," was most clearly, it would seem, indorsed as a "sound construction of the constitution."

In *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, without referring to either of the foregoing cases, it was said, substantially, the rule of taxation is the law of taxation, and the legislature makes the law and therefore prescribes

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the rule; and further, "a denial of the power of the legislature to determine and fix the rule of taxation, subject to the limitation of the rule of uniformity, and attempt to ingraft it [the rule] on the constitution itself, as had been done by apt words in other constitutions, has led to much diversity of opinion if not confusion of terms." The idea that the rule of taxation is the law of taxation was suggested in the opinion of Judge HUBBELL in *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431, and it was there grounded on the idea that the constitution, sec. 1, art. VIII, permits various rules of taxation, and as many as there are different legislative classes of property prescribed for taxation, which, we have seen, was only subjunctively considered and decided on the appeal, and was held to be erroneous in numerous cases thereafter.

It might be thought, if not repudiated, that the language quoted from the *Wisconsin Central R. Co. Case* refers to the *Knowlton, Slauson,* and *Hale Cases.* We make the disclaimer, since if there had been, on so important a question, any considerate purpose to overrule or even criticise a line of decisions by which the subject referred to had been supposed definitely settled for some eighteen years, that fact would doubtless have been made plain by special reference to such cases.

There are other expressions in the *Wisconsin Central R. Co. Case,* in their literal sense, suggesting that mere details in laying taxes on property are necessarily part of the rule of taxation, and that they themselves must be uniform, such as "manifestly it [the rule of taxation] is the act of levying a tax or imposing taxes," "it is the measure of individual duty in support of the public burdens and the means of enforcing the same. The rule . . . must be prescribed by the legislature." It "could be applied to rate, or valuation, or mode, or means of assessment or collection, . . . or to all property, or to certain subjects, or to certain classes, or kinds, or species of property." We quote thus at length in aid of harmonizing

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upon some clear conception, if practicable, of the rule of uniformity and the source of it, by which the law in question must be tested.

Two years after the first *Wisconsin Central R. Co. Case* was decided, in *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 137, 15 N. W. 121, a case where the subject involved appropriately suggested the expression, Justice LYON, for the court, evidently speaking advisedly, used the term "the uniform rule of taxation ordained by the constitution, art. VIII, sec. 1."

Enough has been said to indicate that the court, in the language quoted from the first *Wisconsin Central R. Co. Case,* could not have intended that the mere mode or manner of assessment of property for taxation or collection of taxes, or assessment of taxes on property, of themselves are parts of the rule of taxation, or that one rule can be applied to one class of property and another rule to another, except in respect to the one being taxable and the other not. True, as the court said and evidently intended, the rule may be applied to details in that details may be provided inconsistent with the constitutional rule or principle. True, the legislature "fixes the rule of taxation:" passes laws subject to the rule of uniformity of the constitution. In other words, the legislature, having regard to the basic principle of uniformity, the real rule in the abstract, must needs pass laws giving vitality thereto and necessarily in conformity therewith. So in a sense the constitution prescribes the basic principle, the real rule of uniformity in the abstract; the legislature prescribes the rule in the concrete: in the sense of creating a union of constitutional principle and such laws as are necessary to give vitality thereto. Those laws are the essentials, as indicated: those for the ascertainment of values and fixing rates and applying the latter to the former so as to effect the constitutional equality, must necessarily be uniform throughout the state, having regard to the varying conditions as to taxing districts requiring varying amounts to be raised in them re-

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spectively for the needs of the special localities. Laws as regards mere details, designed to be aids in applying the rule, may or may not violate it according as they reasonably are in furtherance of it or are manifestly otherwise.

As to the legislature prescribing the rule of taxation in any other sense than above indicated, it is considered that cases cited which might be taken, in some nonessentials, as out of harmony herewith, and also *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 476, 45 N. W. 526, 46 N. W. 51; *Black v. State,* 113 Wis. 205, 216, 89 N. W. 522, are to be read in such harmony.

(f) As anticipated, little more need be said on the last proposition suggested at the outset: on what is the uniform rule of taxation; the one by which the law in question must be tested.

It is the rule prescribed by the constitution vitalized by the legislative essentials (no particular law or laws by themselves, but the legislation as a whole) which, in general effect, appropriately provides for imposing upon and collecting from or on account of the property throughout the state prescribed by the legislature for taxation, an equal proportion, as near as practicable, relative to values and taxing districts, of the whole burden of such taxation. Such essentials include the ascertainment of values in the ultimate, not necessarily every instrumentality to that end, and the rate and the application of the latter to the former so as to secure the final object as near as practicable. Mere differences in methods as to nonessentials in applying the rule itself to a particular class or subclass of property, so long as the same is reasonably calculated to promote such ultimate object, is within the rule because within the principle. All legislation outside of such essentials, or not so promoting, are outside the rule and are condemned thereby.

So it is seen that the constitutional rule looks, as it were, always to the object to be attained, not, necessarily, to the

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mere manner or means of reaching it. That object is equality; that equality relates to the burdens of state taxation, county taxation, city taxation, and so on down to the smallest and least important governmental subdivision authorized to incur expense to be discharged by taxation or by money previously so provided to that end. In other words, there must be that uniformity, which is essential to equality, throughout each taxing jurisdiction, as to tax burdens imposed on property therein. *Lund v. Chippewa Co.* 93 Wis. 640, 647, 67 N. W. 927; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 577, 89 N. W. 596, 90 N. W. 1067; *Jones v. Memphis,* 101 Tenn. 188, 47 S. W. 138; 1 Cooley, Taxation (3d ed.) 333.

Practical equality is constitutional equality. As it is said, "mathematical equality of taxation being unattainable, an approximation, reasonably exact, as nearly proportional as possible in consideration of the difficulties of the subject, and sufficient for the practical purposes of substantial justice, is all that is required." *Boston, C. & M. R. Co. v. State,* 60 N. H. 87; *Plumer v. Marathon Co.* 46 Wis. 164, 50 N. W. 416; *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 137, 142, 15 N. W. 121; *Kirby v. Shaw,* 19 Pa. St. 258, 260; 1 Cooley, Taxation (3d ed.) 257; Burroughs, Taxation, § 26.

The idea expressed in the language quoted from the New Hampshire court is found here very distinctly illustratively applied in the opinion of LYON, J., in *Wis. Cent. R. Co. v. Lincoln Co., supra,* which is substantially as follows: Absolute uniformity in every detail in the assessment of property is impracticable, if not unattainable. It is sufficient to satisfy the constitution, in the case of the assessment of real and personal property, that the law provides for the valuation of real property at its full value, and, though a different method and time are provided for valuing personal property, the difference is immaterial since the law requires that to also be appraised at its full value.

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The result, as above, is believed to be universally sustained, especially by decisions in recent years. If we were to undertake to demonstrate it by reference to constitutions elsewhere and decisions under them, this opinion would necessarily be drawn out to a very great length, and probably without its purposes as to the case in hand, or future situations to which the principles may apply, being promoted. It is sufficient, it would seem, that we have shown that it has been the doctrine of this court, without serious disturbance, for some fifty years, that the constitutional requirement is not as to nonessentials, uniformity of methods of taxation, but uniformity in results, within the scope of the rule as stated.

The following citations seem to go to the full extent of what has been said, and cover every phase thereof: *Chamberlain v. Walter,* 60 Fed. 788; *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337, 6 Sup. Ct. 57; *State Railroad Tax Cases,* 92 U. S. 575, 611; *Boston, C. & M. R. Co. v. State,* 60 N. H. 87; *Boston & M. R. Co. v. State,* 63 N. H. 571, 4 Atl. 571; *Wagoner v. Loomis,* 37 Ohio St. 571; *State ex rel. v. Jones,* 51 Ohio St. 492, 37 N. E. 945; *State Board v. Central R. Co.* 48 N. J. Law, 146, 4 Atl. 578; *State ex rel. Prout v. Aitken,* 62 Neb. 428, 87 N. W. 153; *State ex rel. Morton v. Back* (Neb.) 100 N. W. 952; *State ex rel. K. C., St. J. & C. B. R. Co. v. Severance,* 55 Mo. 378; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 133 Ind. 625, 33 N. E. 432; *Baltimore & O. R. Co. v. Koontz,* 77 Va. 698; *Shenandoah Valley R. Co. v. Clarke Co.* 78 Va. 269; *Comm. v. Brown,* 91 Va. 762, 21 S. E. 357; *Missouri River, Ft. S. & G. R. Co. v. Morris,* 7 Kan. 210; *Cent. Iowa R. Co. v. Sup'rs,* 67 Iowa, 199, 25 N. W. 128; *Louisville & N. A. R. Co. v. State,* 25 Ind. 177; *Applegate v. Ernst,* 3 Bush, 648; *Franklin Co. v. Nashville, C. & St. L. R. Co.* 12 Lea, 521; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561; *Dayton v. Coal & Iron Co.* 99 Tenn. 578, 42 S. W. 444; *Pacific Nat. Bank v. Pierce Co.*

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20 Wash. 675, 56 Pac. 936; *Adams Exp. Co. v. Ohio State Auditor,* 165 U. S. 194, 17 Sup. Ct. 305; *Adams Exp. Co. v. Ohio State Auditor,* 166 U. S. 185, 17 Sup. Ct. 604.

Having now set the standard by which the most important questions on this appeal must be tested, before taking them up we will consider those of lesser importance, but which are material, in some aspects of the controversy. That will leave, with all the more significance, the chief subsidiary points of contention for the last subject to be discussed.

II.

(a) Counsel for appellant contend that the assessment was unjust in that railroad property was valued on one basis: that of including as a distinct element of great value the franchise in this state, while, generally speaking, the local assessors omitted from their considerations similar elements, as to ordinary corporations, and did not consider the business done, the amount, character, market price, or actual value of the corporate stock or funded indebtedness of such corporations or of joint-stock companies, nor the good will of business as to persons or firms, only valuing the physical property in use in business enterprises; and that the omitted matters would, in the aggregate, had they been considered by such local assessors, have added largely to the assessed value of such general property, and that the state board in determining the value of such property and in arriving at the rate to be applied to railway property did not add thereto anything for such omitted matters. The findings to that effect were all excepted to by counsel for respondents.

The evidence is quite lengthy on this branch of the case. It is not only unnecessary, but hardly advisable, to refer thereto, except in a general way. Many assessors testified, in words, as found by the trial court, but to our mind the inference the court drew therefrom is unsound. The reasons leading up to such wrong conclusion seem quite plain. As

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the witnesses were interrogated, they were impressed with the idea that it was thought that franchises, good will, and similar elements are property in that they are separable from physical things used in a going business, when one is valuing the latter in the business in which they are used, as is of course true in one sense. In that view they testified uniformly that they did not appraise the intangible elements except as to certain public service corporations which, as they conceived, the state requires to be so separately considered and a definite sum added to the value of physical things on account thereof. On the other hand, all testified, when interrogated in respect thereto directly, that they valued the property in all cases at what the same was worth in their judgment, taking the market value as a standard.

Now, the statute does not contemplate that franchises of any sort of corporations, private or public, or good will, or prospects in business, or any such matters shall be considered by the assessor and valued as separate elements; that any definite sum shall be added to the value of the physical things on account thereof. It only contemplates valuation of such physical things under the circumstances of each particular case. The value of the physical elements of corporations, or business property, is made up largely of those which are invisible. Sometimes the value of the latter exceeds that of the former in that, were the two separated, the visible things in the disorganized condition would be worth less than half the value of the property in use as an organized enterprise. *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 68, 100 N. W. 1048. In valuing such property, looking only at the visible elements, one would unconsciously include the invisible. No one would think, in valuing a factory of any sort with an established business, of its value as a disorganized piece of property. In appraising it in the former condition at what it would be thought to be worth in money, and without specially taking into consideration the elements giving

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thereto, perhaps, its chief value, such elements would be in fact included. As a going institution it might be worth all which it originally cost, or more; as a disused piece of property it would be quite likely to be of much less value than it cost, and it might be practically valueless except as mere wreckage, as is illustrated in the case cited.

To our minds, when the witnesses, on the trial of this case, said they valued the property of business corporations and companies, observing only the things visible, fixing the value upon those things as they found them, whether they specially thought of the other elements and considered the same or not, they were in effect included. That would be the necessary inference in the absence of very clear evidence to the contrary. There is no such clear evidence in the record before us.

The statute (sec. 1037*a*, Stats. 1898) referred to as requiring assessments of franchises in certain cases makes no such requirement in any other sense than as above indicated. Before the passage of the statute it was well settled by the decisions of this court that, there being no written law requiring the separation of tangible elements from intangible ones, such as rights, franchises, and privileges, in assessing the property of a corporation no attempt should be made to do it; that the assessment of the one should be included in that of the other by assessing the visible elements at what they are worth in money under the circumstances. *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 63 N. W. 746. The statute did not change the law, but merely made that written which was before unwritten. *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 19, 85 N. W. 685; *Washburn v. Washburn W. W. Co.* 120 Wis. 575, 98 N. W. 539.

It will be noted that the statute merely declares that all property of certain public service corporations mentioned, used in their business, shall be assessed as one body of personal property, which shall include the franchise. It merely recognizes that the visible things, necessarily, in their value,

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include the franchises. Notwithstanding statements here and there in opinions, as to the feasibility of appraising one separate from the other, the better and the prevailing idea is that it is practically an impossibility to do so, without destruction of value.

This court has held that the franchise is the principal, the visible things the minor, part of an organized business machine, in a corporate organization, though the franchise is seen only through the physical part and its use; that the intangible part is personal property and draws to it, and so impresses the physical thing with its own character as to give to the whole the character of personalty. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554, 51 N. W. 1004; *Chapman Valve Mfg. Co. v. Oconto W. Co.* 89 Wis. 264, 60 N. W. 1004; *Fond du Lac W. Co. v. Fond du Lac,* 82 Wis. 322, 52 N. W. 439; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 63 N. W. 746; *Washburn v. Washburn W. W. Co.* 120 Wis. 575, 98 N. W. 539. In the latter case it was supposed that this particular subject would be definitely set at rest for all purposes of administration of public affairs in this state, this language being used for that particular purpose:

"The separate value of the parts in the aggregate would not necessarily approximate to or be any legitimate measure of the value of all the parts, viewed as one complete machine, so to speak. The franchise by itself would be valueless. The plant in its parts as realty and personalty according to the character thereof, irrespective of the combination of all into one entire thing, might be of little value, and probably would be, as compared to what they would represent in the new form, produced by the union of many parts into one. The great value is produced by the combination of parts into one complete working machine, adapted in a high degree to the service of man. . . . So, in order to deal justly in the distribution of public burdens, the entire property in use and for use in the exercise of the public franchise, for the purposes of taxation, should be regarded as realty, the franchise

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and movables being viewed as appurtenant to the lands, or the intangible element regarded as personalty, and the physical elements, consisting of lands and movables, be regarded as appurtenant thereto and partaking of its character. The latter . . . is the most consistent with, and really demanded by, the constitutional method of imposing public burdens in the form of taxation, as regulated by the legislation of this state. . . . The system in vogue here contemplates that everything of value constituting a subject of private ownership and wealth, whether tangible or intangible, which the legislature shall select for the purpose, may be included in the aggregate of property to bear the public burdens of taxation, and in the manner best calculated to take account of values produced by the combination of franchises and other things of value; which can only be attained, as regards the former, which in their very nature are inseparable from the latter without destruction, so to speak, of the body in which inheres the great value, by appraising them as integral parts of the combination, to be viewed in its entirety only, every element being impressed with the character of the one from which springs the public duty and the necessity for inseparable union with it of tangible things consisting of lands and movables, in order to perform it."

Viewing the evidence in the light of the law as thus settled, our conclusion is that the inference drawn therefrom by the trial court is not warranted. Notwithstanding the testimony of witnesses that they did not consider intangible elements in viewing corporate or other business property in use, the evidence that they valued the property as they saw it, at what it was worth in their judgment, by necessary implication states that they valued the intangible elements in the only way the statute contemplates they shall.

(b) The companion finding to the one above considered, to the effect that the state board did not add anything to the aggregate valuations made by local assessors on account of elements omitted from their considerations, while in valuing the railway property such elements, particularly the franchises, were considered, and the value of the whole placed at

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millions of dollars higher than the value placed upon the physical property, suggesting that the franchises and the physical property were separately valued, seems to be unsupported by the evidence. The mere circumstance that the board made some sort of an estimate of the value, so called, of physical property,—the instrumentality to that end, making the valuation on the basis, it would seem, of what the physical things would cost less, probably, any diminution in value on account of use,—was regarded by the court as an assessment, a valuation of that part of the whole property separate from the other elements, when it was evidently regarded by the board, as it in fact was, merely as an aid in arriving at the value of the one thing to be appraised. The statute does not require any such procedure as the appraisal of physical property separately from the other elements, and judicial policy condemns it. The board, of its own motion, and in aid, as was thought, of reaching the ultimate object of placing a value upon the railroad property *in this state,* in its wisdom did the thing which seems to have confused the trial court somewhat, and which furnished the foundation for the claim, now pressed upon our attention, that millions of dollars were added to the legitimate valuation of the visible part of the railway property on account of a separate valuation placed on the franchises. It were better, as it seems, to have proceeded along the lines of the statute and the doctrine of this court, that there can be no such separation of tangible and intangible elements which will furnish any legitimate basis for the valuation of one or the other. As neither, strictly speaking, is required to be valued, but only the thing which the two in combination make, why attempt to do what lays the very basis for claims which are illegitimate though embarrassing? The departure from the needful, trying to do the impracticable, would seem to be worse than useless. One might as well try to value the life-blood of a horse, or his capacity to breathe, as try to place a value upon the visible part

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of railroad property separate from its rights, franchises, and privileges.

Probably no one appreciates the foregoing better than the eminent gentlemen composing the state board of assessors. They knew the law and their duty. They had a wide discretion in respect to the mere elements to be considered in making the valuation. If they thought the so-called valuation of physical property would aid them, they were permitted to procure evidence of that sort. We find, however, no satisfactory indication that they arrived at the value of the railroad property by adding together a valuation of visible things and one of other elements, or that they did anything else other than just what they were required to do by the statute, determine the value of the railway property in this state; that included the visible things and the franchise, not as separate things any more than the horse's blood, frame, internal machinery, and other elements are separate things; all taken together constitute the horse; remove any one of the things essential to life and action, and all conception of the animate thing, the horse, disappears.

To our minds the only reasonable inference is that the board, from all the evidence before it, performed the duty that it was required to perform. The evidence as we read it is to this effect. The board considered the report of the person who, as before suggested, performed the feat of separating and valuing the physical property, the market price as to each company of its bonds and stocks for a period of five years, reports of the engineers of the railway companies as to the physical property, the gross and net earnings of each company, both in the whole and in this state, and other elements, and fixed the value of the entire property of each company in this state at its due proportion of the value of the entire system, not giving to any particular factor of the evidence any particular weight separate from the other, nor placing any particular value upon any particular element of

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the property separate from the rest. We see no infirmity in that in any respect. The board did not attempt to value the visible things at one sum and the franchise or any other intangible elements, separately or in combination, at another. The evidence given by the president of the commission is unmistakable as to what was done. He said:

"The board never made any estimate of the value of the physical property of the road." "The board did not have any other evidence of the value of the property, physically considered, than the reports of Prof. Taylor and of the railroad engineers. The board considered the entire property of the railway company, including its franchises and other property, to be of the value stated, being influenced in that consideration by all the matters that related to that subject of valuation." "Those matters of stock and bond prices, the gross earnings, franchises, and the net earnings were under consideration. The board had no reason to doubt the report of Prof. Taylor. These data, price of stock and bonds, gross and net earnings, were considered as evidence of the value of the company's franchises, to help the board in arriving at the value." *"The property was valued as an entirety.* No separate treatment was given to franchises from that which was given to the problem of valuing the property as a whole. It was valued as a whole, and in the valuation of the whole all these methods that I have enumerated were considered."

That seems plain. We are unable to see anything therein to warrant finding that the board placed a value on the physical property and another on the franchise element and added the two together, or making any finding susceptible of being so construed.

The trial court, seemingly, was led to phrase the findings so as to give ground for the idea of physical property and franchise values separately considered in arriving at the value of the whole, by the persistent use of the term "value of the physical property," all through the trial, while it is evident that, so far as the assessing board was concerned, the

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term had reference to physical condition and situation only. It does not appear that the value, strictly speaking, of the things visible separate from other elements was considered, much less determined.

(c) The trial court's conclusion does not show clearly the manner in which the board valued the general property of the state. One might think, from reading the findings, that it was thought the local assessors, acting in good faith, omitted giving the dignity, as to value of franchises and some other intangible matters affecting that of tangibles used in corporate and other business, which they should, and that the board, also acting in good faith, adopted their errors. The board was not expected to and did not consider the work of the local assessors in any other way than as evidence to be considered with all other legitimate evidence. They were required not to merely pass upon the work of such assessors, but upon certain specified proofs and upon all the other evidence, proofs, statistics, and information obtained from all sources, "according to their best knowledge and judgment, to ascertain and determine the true cash value of all the general property of the state assessed and to be taxed in the year in which their determination should be made." The finding does not show whether it did or did not perform that duty, except by way of inference. Such finding is to the effect that the board considered all the evidence it was required to consider, and assessed the value of the property, but without adding anything specifically to local valuations for franchises, only considering them as affecting the value of corporate property, and did not add anything for other intangible elements mentioned as having been omitted by local assessors. Whether the trial court thought the board committed error in that does not, anywhere, appear. The inference would be that it was so thought, because of the significant finding acquitting it of having acted in bad faith.

Now, if the board valued the general property of the state

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upon a legitimate basis, it is wholly immaterial what errors were committed by the local assessors. Obviously the basis of the rate of taxation applied to railway property in that case would be in no wise affected by any such error.

So, the board did not commit any error in not adding specifically for the value of franchises; they avoided committing error by not so doing. In considering franchises of public service corporations only in connection with visible property they followed the statute and the settled law independently thereof. In omitting to add specifically for any other omitted elements mentioned, or specially considering them, particularly of considering the corporate franchises of mere private corporations and assessing other property any different on account thereof than the same property would have been assessed if the same belonged to an individual or individuals, they committed no error.

(d) A very important fact, going to the justice of the tax, appears by the evidence, which might well have been made a part of the findings, since it was within the issues and was distinctly covered by the evidence. While it does not appear that the board made any specific determination as to any particular kind of personal or other property omitted from the local valuations or valued too low locally, it does appear that it considered, in a general but well grounded way, that there were such omissions and undervaluations, and on account thereof it made its valuation of personal property $215,000,000 more than the aggregate of local valuations, or nearly twice thereof; and likewise it made a very substantial increase to the local valuations as to realty.

Then let it be assumed for the purposes of the case, as counsel for respondent suggests, that the law under which the state board acted did not require it to value any general property except that which was valued by the local assessors; that it was not required to hunt up omitted property and make its valuation larger than it otherwise would have been

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on that account, if it erred in that respect, largely diminishing the burdens that would otherwise have been cast upon railroad companies, they can hardly be heard to complain of it, especially in a court of equity. On the whole, as to this branch of the case, the respondent and all taxpayers similarly situated seem, in the painstaking efforts of the state board to do justice in the matter, to have been given the most distinguished consideration.

(e) The board, in endeavoring, as before indicated, to remedy the supposed mistakes of the local assessors as to omitting to assess property at all, perhaps assumed authority not clearly accorded to it. However, there is no proof that such omissions, if there were any, occurred otherwise than as the result of mere ignorance or error of judgment in a good-faith attempt to administer valid laws. Such circumstances furnish no good ground for complaint on the part of a taxpayer to avoid his tax. *Weeks v. Milwaukee,* 10 Wis. 242; *Smith v. Smith,* 19 Wis. 522; *Semple v. Langlade Co.* 75 Wis. 354, 44 N. W. 749; *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 587, 45 N. W. 536. The law is well settled, here and elsewhere, that mere unintentional discriminations occurring through error of judgment, and mere differences between different assessors or assessing boards having equal discretionary authority as to evidentiary circumstances to be considered in valuing property for taxation, are not to be classed with intentional or fraudulent discriminations, or discriminations made by the law itself. In that counsel seem to have misapplied such authorities as *Hale v. Kenosha,* 29 Wis. 599; *Knowlton v. Rock Co.* 9 Wis. 410; *Pelton v. National Bank,* 101 U. S. 143, and similar cases, and also overlooked the limitations placed upon *Marsh v. Clark Co.* 42 Wis. 502, 509, quoted from at considerable length by counsel; *Fifield v. Marinette Co.* 62 Wis. 532, 22 N. W. 705; *Hixon v. Oneida Co.* 82 Wis. 515, 531, 52 N. W. 445; *Wells v. Western P.*

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& S. Co. 96 Wis. 116, 120, 70 N. W. 1071; *Hayes v. Douglas Co.* 92 Wis. 429, 444, 65 N. W. 482.

The doctrine, as above expressed, is supported generally by the authorities. In Cooley on Taxation the subject is covered thus, using as the text, mainly, the language of this court in *Weeks v. Milwaukee,* credit being duly given:

"It has been decided in a number of cases that incidental omissions from taxation of person or property that should be taxed occurring through the negligence or default of officers to whom the execution of the taxing law is intrusted would not have the effect to vitiate the whole tax. . . . The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties were to vitiate the whole tax, no tax could ever be collected, and therefore, though they sometimes increase improperly the burden of those paying taxes, the rule which holds the tax not thereby vitiated is absolutely essential to the continuation of the government. . . . Indeed, where the omission has occurred through no purpose to evade or disregard official duty, the occasion which produced it seems wholly immaterial."

Spear v. Braintree, 24 Vt. 414; *Watson v. Princeton,* 4 Met. 599, are to the same effect. In the last, Chief Justice SHAW said that the final remedy for mere ignorance or want of judgment of assessors, the inhabitants believing "that their assessors are acting on erroneous principles, is to elect others in their places." To the same effect are *Wilson v. Wheeler,* 55 Vt. 446; *Burlington & Mo. R. R. Co. v. Seward Co.* 10 Neb. 211, 4 N. W. 1016; *Levi v. Louisville,* 97 Ky. 394, 30 S. W. 973; *Davis v. Newark,* 54 N. J. Law, 144, 23 Atl. 276; *State v. Lakeside L. Co.* 71 Minn. 283, 73 N. W. 970; *People v. McCreery,* 34 Cal. 432; *Georgia M. & G. R. Co. v. State,* 89 Ga. 597, 15 S. E. 301.

It should be said in passing that there are some authorities

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holding to a more strict rule than the one indicated, but they are not to be followed in this state.

III.

We are favored with a very lengthy and interesting argument by counsel for appellant, presenting the idea that the law in question is a delegation of legislative power, and void under sec. 1, art. IV, of the constitution, limiting such power to the senate and assembly.

The situation before us being the same as that presented to the supreme court of Michigan (*Board of Ed. v. State Board,* 133 Mich. 116, 94 N. W. 668) and the federal circuit court (*Michigan Railroad Tax Cases,* 138 Fed. 223), and the federal supreme court as well [*Mich. Cent. R. Co. v. Powers,* 201 U. S. 245], and being supported here by the same argument, as we were told by counsel, as was presented on the former occasions, with the result that the position now taken was held to be unsound, we might rest the matter on the authority of those decisions, especially in view of the recent discussions in this court of the principle involved, particularly that in *State ex rel. Milwaukee Medical College v. Chittenden,* 127 Wis. 468, 107 N. W. 500. However, through abundant precaution, and a desire to do full justice to the efforts of counsel to aid us in arriving at the right of the matter, we have made a reasonably careful study of all the aspects thereof suggested, examining all of the more than fifty authorities cited to our attention, with sufficient particularity to discover, as is thought, their bearing and importance; though, for the reasons stated, we shall not discuss this branch of the case to the extent which we otherwise would.

It seems that counsel have assumed that the law in question authorizes the state board to levy taxes or determine the rate of taxation, in the sense of determining the basic question of how much money shall be raised by taxation for public

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purposes from a particular class of property, instead of as the fact seems to be, that it merely authorizes the board, partly by the exercise of merely ministerial powers, and partly by those ordinary *quasi*-judicial powers commonly exercised by administrative boards, to ascertain certain facts, and from those facts, by mere mathematical work, to determine the amount of tax to be paid as a direct imposition on railway property, pursuant to a previous exercise of legislative authority by the duly constituted authorities to that end. Starting with the assumption indicated, it is not to be wondered at that the multitude of authorities presented to our view should have been thought to have a bearing on the question to be decided.

No one need argue to this court that the legislature cannot delegate to any mere administrative board power to determine how much money shall be appropriated, "levied," as the term is used, for state expenses, but we must not confuse the term "levy" in the sense of voting a tax, or determining in gross how much shall be raised by taxing a particular class or general property, with the term "levy" in the sense of merely performing the administrative duty of laying, on a legitimate basis, taxes previously levied, appropriated, or voted by the legislature. Manifestly, without that distinction in mind one would make but very little real headway in the examination of authorities; many would be found stating in terms or in effect that levying of taxes and fixing the rate of taxation are legislative duties, referring, of course, to levying in the sense of determining how much money shall be raised by taxation, fixing the rate in the sense of determining it with reference to the public needs. If there is anything of that sort in the law in question we are as unable to discover it as were the courts that have previously been called upon to consider the similar question in regard to the Michigan law.

It is advisable, in endeavoring to establish the legal status

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of a particular matter, to first fix by accurate analysis the exact nature of that to which the legal principles are to be applied. If one starts with a mere assumption in that regard he may easily delude himself into the idea of having arrived at a correct solution of the question at issue, when, in reality, he has not yet helpfully entered upon a discussion of it.

The foregoing is well illustrated by the following authorities, cited in the brief before us. In *Houghton v. Austin,* 47 Cal. 646, we read in the syllabus: The law, "in so far as it delegates to the state board the right to fix the rate of taxation, is void." Looking to the law referred to we find that it gave to the board authority to determine in gross the amount of money to be raised for public purposes, and on that and other data to fix the rate.

In *Board of Directors v. Houston,* 71 Ill. 318, it is said: "It was not in the power of the legislature, under the constitution, to confer upon private persons or private corporations power to levy . . . taxes." Laying aside the element of private instrumentality, the defect in the law was that of levying by the board, in the sense of determining the amount to be raised by taxation.

In *McCabe v. Carpenter,* 102 Cal. 469, 36 Pac. 836, the subject of the decision on the point here is stated thus: "The power to levy a tax is purely legislative." In that connection the opinion is to the effect that state taxes must be levied by the legislature, and taxes of sub-public corporations by the people thereof, or the duly constituted governing authorities therein. The circumstance giving rise to the case was a law permitting a mere executive officer to determine the amount of money to be raised for a particular purpose, and requiring the municipal board, without the exercise of independent judgment as to the right or wrong of the matter, to execute the will of such officer. The distinction between such a law and the one here was indicated by this language of the court: "The legislature imposes the tax when it requires an officer

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to make certain computations, the result of which must fix the amount to be raised." We might proceed to analyze in detail a large number of other authorities placed before us, which number might have been greatly increased, with the result indicated by those specially referred to.

So far as we can see, every feature of the work required of the state board under the law in question is in the line of executing, not making, the law. It is required to value the property upon which the tax is to be laid. It is required to determine, as mere matters of fact, the average rate of taxation on general property in the state. It is then required to apply that rate to the value, as determined by it, of the railway property pursuant to the previous determination of the legislature to raise, by taxation, the amount such rate, so applied, will produce.

The Michigan court said of the same feature we have here in its system:

"The board has imposed on it the duty, ministerial in character, of determining, by computation and data which the law provides for placing in its hands, the rate of taxation which other property in the state is subjected to, as it appears by assessment rolls, which are supposed to contain accurate and true assessments of all property at its true value. . . . The language is . . . the board shall ascertain and determine the average rate levied upon other property, but the general tenor of the act clearly indicates the meaning in which that determination is to be made."

Any further treatment of this branch of the case would be wholly unnecessary.

IV.

This provision of the constitution is referred to as condemning the law:

"The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, and whenever the expense of any year shall exceed the income, the legislature shall provide for levying a tax for the

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ensuing year sufficient, with the other sources of income, to pay the deficiency as well as the estimated expenses of the ensuing year." Sec. 5, art. VIII.

(a) These ideas are advanced for consideration in respect to that provision: The legislature must determine in advance the amount required to be raised for the particular public purposes, and provide for levying a tax therefor. It cannot legitimately provide for raising a certain indefinite sum by taxation, the sum to be fixed by the action of other bodies over which it exercises no control. As a basis for levying a state tax the legislature, by the constitution, must decide: (1) The question of how much revenue the state needs, that to be determined by its probable expenses; (2) what will be a just distribution, that is apportionment, of the burden.

Many ideas are advanced illustrative of the main propositions. We shall not follow in detail the reasons by which counsel reach the conclusion that the law in question does not successfully stand the constitutional test suggested.

(b) There are these fundamental infirmities in the position of counsel at this point: (1) In that they assume that the constitution requires the legislature, in providing for state revenue, to determine for each year the amount of money required to be raised by taxation, and the purpose making the use of such amount necessary or proper; (2) in that they assume that the enactment in question provides for a state tax, strictly speaking, and that alone.

If the first assumption were sound, all laws we have for indirect taxation, by which the state obtains a large proportion of its revenue, would be invalid. It will be noted that the language of the constitution is general. It does not say the legislature shall provide for an annual tax on property, etc. If counsel's position were correct, the legislature in providing for the raising of money by any sort of taxation would have to, annually, first determine the amount necessary to be raised, the proportion thereof to be obtained by

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direct and indirect taxation, and the basis for levying the tax, in order to produce the required result. It does not seem that such a construction of the constitution would be reasonable. The common way of laying taxes, state and national, is to provide for an annual tax sufficient to meet the annual expenses, having regard to the experience of the past and the probabilities of the future, and to appropriate from the fund so accumulated, or to be paid therefrom when accumulated, such sums as seem for the fiscal year necessary for the particular purposes. The raising of the revenue is one thing; the appropriation of the money to proper public purposes is another. The last is covered by sec. 2 of art. VIII, "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Taking the two together it will be seen that one section provides for accumulating the public fund out of which appropriations for public purposes may be made; the other provides for devoting the same to the specific public purposes.

So when the legislature determines upon supplying the public treasury in any legitimate way of annual taxation and the extent required for the annual public needs, in its judgment, and provides a form or forms of taxation the results of which can only be estimated, together with or without one that will produce a sum certain, all in the aggregate supposed to be sufficient to meet the estimated wants, it satisfies the requirement of the constitution. The only limitations are, it cannot exercise the power of taxation for any but public purposes, and having exercised such power it can only devote the money accumulated thereby to public purposes, and by some reasonably proper way of appropriating the same, so that legislative action can be referred to as authorizing payment of the money out of the public treasury. *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 94 N. W. 50.

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The two clauses of the constitution, as indicated in the cases cited, are to be read together as limitations upon the purposes of exercising the power of taxation and the power to use the money accumulated by its exercise. *Expressio unius est exclusio alterius.* There is no limitation upon the method of determining the needs, calling for the exercise of the taxing power, in that it is confined to determining by annual or biennial legislative action in advance the precise amount of money required for all or any of the public purposes. True, sec. 5 contemplates that the legislature shall, in imposing direct tax burdens, do so with reference to the public needs, and with reasonable regard for the amount of revenue that will probably be derived from other forms of taxation, so that in the aggregate there will be money produced to the public treasury enough to meet the estimated expense, but not estimated expense in the sense that there must necessarily be a schedule prepared by the legislature, or by any person or persons for its guidance, and that the power of taxation shall be exercised with reference to producing the amount of money suggested thereby. The judgment of the legislature as to what the public needs will be need not be express. It is to be implied, necessarily, from what is done, in the absence of the clearest of indications to the contrary.

It will not do to set up a judicial standard as to the best method of determining the amount of money to be raised by taxation and of framing laws to put the taxing machinery in motion to that end. Probably the annual budget method is the most businesslike way, both with reference to the amount to be raised by taxation and the division thereof to the particular public purposes. But the constitution leaves the way open for the legislature to exercise the widest discretion in that matter. It can proceed by various forms of taxation for raising public revenue, all or most of which may leave the amount that will be produced thereby somewhat indefinite, so long as the legislative idea is an annual

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income sufficient for the annual needs, and it would be difficult to see how a court could determine that such legislative idea was not involved in the passage of any law relating to the matter, unless the law itself expressly indicated to the contrary, by way of making an appropriation for a particular purpose not public, or providing for the raising of a tax for such a non-public purpose.

(c) It does not seem that the law in question should be regarded as a mere enactment to raise money for state purposes. It is called one to provide for the taxation of railroad companies. The manifest purpose thereof is to tax the railroad property in the state upon the same basis that all other property is taxed; tax it by the same system (the *ad valorem* way), at the same rate, and for the same purposes. Whether the plan of the legislature be reasonably calculated to effect such purpose we need not enlarge upon at this point. If necessary to the validity of the law, and the idea would be reasonable, we must assume that such was the legislative design and read it out of the law if it is there in any way expressed. It was thought, seemingly, that the amount of money which would probably annually be required to be raised by direct taxation, so far as the same could well be determined when the law was passed, with the amount which would be obtained annually from all other sources of state revenue, would probably equal or exceed the amount of direct tax burdens that would fall on railroad property, if it were burdened, in effect, the same as if it were taxed, proportionally, in all the taxing districts of the state, on an equality with general taxable property therein, the value of the former being, for that purpose, apportioned thereto, in the proportion which the value of such general taxable property in such districts, respectively, would bear to the total value of such property throughout the state, or, perhaps, if such special property were taxed on a similar basis of distribution in all of the taxing districts of the state through which the roads run. It was fur-

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ther, doubtless, thought that the average rate provided for by the law would, as near as the same could be practicably determined, be equivalent to such taxes as would, upon such a distribution, be imposed on the special property. It was further, and within reasonable probabilities, thought, as it would seem, that by applying to the value of special property the average rate of taxation imposed on general property throughout the state, and appropriating all of the results for state purposes, in practical effect each taxing district, while proportionally more heavily burdened for local purposes than it would be under some such method of distributing the value of the railway property for taxation as mentioned, would be correspondingly, as to every dollar of taxable property therein, relieved from state taxes; thus making all property taxed directly, in fact though not in form, bear its relative proportion of all taxes upon a basis of equality. That would satisfy all the requirements of the section of the constitution under consideration.

V.

The validity of the law in question is challenged under sec. 1, art. I, and sec. 13, art. I, of the state constitution, and the XIVth amendment of the national constitution. Special consideration thereof is omitted because of what is said in respect thereto under other heads.

VI.

We turn now to that branch of the case involving the principles laid down at first relating to sec. 1, art. VIII, of the constitution. The treatment of that by counsel is under several important subheads. Some of them fall, legitimately, under other equality provisions than sec. 1, art. VIII, as has been indicated. There is little or no difference in the result as to whether they are viewed together or separately. The

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first one we will take up is so within the particular class of real or supposed interferences treated in numerous federal cases under the XIVth amendment, that such cases furnish a very fruitful source of illustrations as to whether it does or does not fatally invade the constitutional rule of equality.

(A) Fatal discrimination in the assessments, as between railway property and general property, is claimed in that, as shown by finding 21, under ch. 378, Laws of 1903, mortgage interests in real estate, except as to railway property, were generally assessed to the owners thereof as realty, the residue of the value only being assessed to the mortgagors.

The nature of so much of ch. 378 as is necessary to have in view in this discussion is indicated by the following abridgment:

(a) The term "mortgage" shall include every conveyance or contract lien on realty intended as security for the payment of money and the indebtedness secured to be paid by such mortgage.

(b) Any such interest shall be regarded as realty and, subject to the next provision, be separately assessed for taxation in the taxing district where the land is located, the value of the equity being assessed to the mortgagor, such value to be regarded as the balance between the whole value and that of the mortgage interest.

(c) At the option of the mortgagor the mortgage interest and the value of the equity shall be assessed together, without separate valuations, the same as if the land were unincumbered, such combined valuation not to exceed the just value of the land as unincumbered property.

(d) Any taxpayer, in furnishing to the assessor of his district his statement of credits over liabilities subject to taxation, shall exclude mortgage interests in realty.

(e) Exemptions in favor of the mortgagor of debts owing by him shall not be allowed on account of the mortgage, nor offsets on account thereof allowed in favor of the mortgagee.

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(f) Existing laws exempting mortgages of realty from taxation shall not be affected by this act.

(g) This act shall apply only to mortgages on realty subject to direct taxation, and within the foregoing limitations.

Under the last subdivision no diminution of value of railroad property could be or was made by the state board because of incumbrances thereon of a mortgage nature.

Under subdivision (c) it is claimed that regardless of the amount of the credits, whether less or many times the value of the land, in form securing the same, the value of such land must necessarily be the measure of the possible assessment as to both land and credits, and so it is within probabilities that large amounts of property in the nature of credits, not in any legitimate sense representing interests in lands, might escape taxation under the form of law, while like property of the railway companies and others no better situated would be assessed directly or indirectly, and that it is within probabilities that such result occurred as to the assessments in question. That idea is readable out of the act, looking at the words themselves; but such a meaning would make the legislation so very absurd that no one, much less any court, would considerately adopt it if any other which is reasonable can fairly be read from the language used.

It seems that the whole scheme of the act is that the land value, so far as it will go for that purpose, shall stand for the mortgage indebtedness and be assessed to the mortgagee or mortgagor, at the latter's option, and to that extent that the mortgage indebtedness shall not be regarded as matter receivable owned by the mortgagee, and so subject to be diminished in his favor in arriving at his taxable property, by charging against the same debts owing by him, or regarded as matter payable from the standpoint of the mortgagor and usable by him to diminish his credits in arriving at the amount of his taxable property, and that in case of the value

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of the land being less than the indebtedness secured in form thereby, the excess shall be regarded the same as any other matter of money demand as to the mortgagee, or money payable as to the mortgagor.

Taking subdivisions (a), (c), and (e) together, having regard for the evident purpose of the law, the meaning suggested cannot only be read therefrom, but is quite unmistakable. We could not think of convicting those who had to do with the legislation with being the authors of so mischievous a measure, and guilty of such stupid blundering, as would be implied by indorsing the construction thereof contended for.

It will be observed that it is the mortgage, not the mortgage indebtedness, that is made by the act an interest in the land; it is that interest which is required to be, separately or in combination with the equity, assessed at the option of the mortgagor. That interest carries the mortgage indebtedness to the extent of the value of the land representing it, and no further. Subdivision (e), relating to the status of the mortgage indebtedness as regards being the basis for exemption on the one hand, or offset on the other, uses the word "mortgage" consistently with the use thereof in subdivisions (a) and (b), and clearly in a way to only carry just so much of the mortgage indebtedness as will correspond to the value of the mortgage interest in the land. True, subdivision (a) declares that the term "mortgage" *shall include the mortgage indebtedness secured to be paid by such mortgage,* but that, fairly, means, shall include it to the extent secured thereby. The idea that a mortgage on a parcel of realty worth $1,000 may, under the act, include a mortgage indebtedness named in a mortgage thereof, say of $10,000, so that the value of the former will, in contemplation of law, be the measure of the value of both for the purposes of taxation, does not appeal to us with any favor. The term "se-

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cured to be paid by such mortgage," looking at the substance of things, is seen fairly to be limited by the extent to which the mortgage would pay the indebtedness.

As a model for careful legislation the act is not to be, very highly, at least, commended. Nevertheless, the legislative idea intended to be incorporated therein is not particularly obscure; it is well within the scope of the language used, as we have indicated.

(B) Regardless of the proposition already discussed, it is contended that the effect of ch. 378 is to relieve owners of real estate, generally, incumbered by mortgages, of tax burdens thereon to the extent of the incumbrances, while owners of railway property are not so favored, and that such discrimination invades the constitutional rule of uniformity. That is hardly accurate. The effect is, in view of the railway property not being regarded as realty, to relieve the owners of mortgaged lands generally, at their option, in form, from the burden of taxation, except as to the value of their respective equities, while owners of incumbered personalty, including railway companies, are not so favored, and to exempt all credits secured on realty, generally, to the extent of the value of the security, from taxation, while credits secured on personalty are not so exempt, and to take all indebtedness secured on realty to the extent of the value of the equity out of the list of debts owing by the mortgagor chargeable against his credits in determining the amount of his taxable property of the latter sort, while debts of others, whether secured on personalty or not secured at all, are not so treated.

Counsel for appellant, in their view, refer, as worthy to control, to *San Mateo Co. v. Southern Pac. R. Co.* 13 Fed. 145; *Railroad Tax Cases,* 13 Fed. 722, and *Santa Clara Co. v. Southern Pac. R. Co.* 18 Fed. 385, and some other federal cases, but none decided in the federal supreme court, recognizing the doctrine first laid down definitely by Justice FIELD in the *Santa Clara Case,* as sound. Such doctrine, if

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given the force counsel accords thereto, would condemn the law here under the XIVth amendment.

Counsel for respondents assume to break the force of appellant's position as above, by referring to *Cent. Pac. R. Co. v. State Board,* 60 Cal. 35, and *Germania T. Co. v. San Francisco,* 128 Cal. 589, 61 Pac. 178, where similar legislation to ours was sustained. That does not meet the case, since the constitution of California expressly negatives any limitation upon legislative power in respect to the matter. Counsel for respondents further suggest that, if the law be unconstitutional, that fact is immaterial, since then all mortgage indebtedness, like other indebtedness, would be taxable to the creditors, citing *Kneeland v. Milwaukee,* 15 Wis. 454. Here, again, no real advance is made as regards furnishing a basis for solving the question in hand, since the theory suggested as supporting the taxability of mortgages or mortgage indebtedness, if adopted, would present the question anew as to whether the valuation of general property for taxation be not fatally defective by reason of the omission of large amounts of property, or a strong probability in that regard, not through any mistake of judgment or mere inadvertence, but because of the local assessors being required, in form, by an invalid law, not to assess the omitted property. On that the decision in *Kneeland v. Milwaukee,* 15 Wis. 454, has not, as appears, been overruled. The theory thereof is that if a law good in form but invalid in fact commands the assessors to violate the rule of uniformity, and they do so in good faith, prejudicially to taxpayers, it is not one of those mere mistakes said not to affect the tax.

Again, the decisions in California are of little help, in face of the fact that a state law which violates the fundamental right of equal protection of the laws falls under the condemnation of the XIVth amendment, whether it is or is not in harmony with the state constitution. The state constitution itself may violate such fundamental rights. *Nash-*

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ville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168. That is the basic principle upon which jurisdiction was taken in the *San Mateo Case.* Independently of that principle, as said, commonly, in the federal cases, in terms or in effect, what invalidates the equality provisions of the federal constitution depends so much upon the circumstances of each particular situation and upon the constitutional guaranties, immunities, and privileges in the organic law of the state where the question arises, that the result in one instance does not furnish any very certain guide as to any other situation, particularly one under a different constitutional system.

In the last idea expressed is the chief infirmity of the position of counsel for appellant. It seems to be assumed that the case arising in California, decided by Justice FIELD and an associate, should be controlling here. No differences in the two situations are recognized by counsel, while there are such, and of quite a radical nature.

It would take a pretty clear case to warrant a court in condemning the law of its own legislature under the equality provisions of its constitution on the faith of a decision in the highest tribunal of the land upon a somewhat different situation. To do so merely on the strength of a decision of a lesser federal tribunal, even when pronounced by so eminent a jurist as all recognize in Justice FIELD, would not be warranted at all.

It seems that, so far as the *Santa Clara County Case* is like, in its facts, to the one before us, it runs counter to many recent decisions of the federal supreme court. Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, with-

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in the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. Few cases that can be found have gone further on that line than *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833. There, as we have seen, a very small subclass of real estate, a class so small as to be confined to one owner, was deemed sufficiently different from realty generally to warrant the legislature in exempting it from taxation. It is not likely, as we have before indicated, that this court will soon go further on that line than it did in that case. Certainly there is no call therefor in the case before us. In the particular field covered by the ultimate result there reached, the case is distinguished for definiteness, and has been frequently referred to with approval, here and elsewhere. *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 42, 69 N. W. 794.

We do not find the cases relied upon by counsel for appellant, though nearly a quarter of a century has elapsed since they were decided in the circuit court of California, have been referred to in any decision of the supreme court of the United States as authority on the particular question. We do not find them referred to in any decision in a lesser federal tribunal with approval in a manner sufficiently indicating that the doctrine thereof in question has been received as authority under sufficiently similar circumstances to those in hand, to make them particularly persuasive here. The principle, as thus mildly read out of such cases, has been applied commonly:

"Now, the equal protection of the laws declared by the XIVth amendment . . . of the constitution, secures to each person within the jurisdiction of a state exemption from any

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burden or charge other than such as are equally laid upon all others under like circumstances." ANDERSON, Circuit Judge, in *Fraser v. McConway & T. Co.* 82 Fed. 257, 260, citing the *San Mateo Case.*

The following indicates fairly the present temper of the highest tribunal on this question:

In *Kidd v. Alabama,* 188 U. S. 730, 23 Sup. Ct. 401, the court dealt with a state law for taxing part of a general class assumed to be a legitimate subclass, while exempting the rest of such general class from a like burden. That was held to be proper as not violating the XIVth amendment, the court saying, "We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis. What is reasonable is a question of practical details."

In *American S. R. Co. v. New Orleans,* 181 U. S. 277, 21 Sup. Ct. 646, a law discriminating as to taxation between two classes of refiners, exempting one and taxing the other, the only distinction between the two being that the latter were producers who did their own refining, while the former were in the business of refining only, was sustained, the court saying:

"The act in question does undoubtedly discriminate in favor of a certain class of sugar refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid." "This court has had, repeatedly, occasion to sustain discriminations upon reasons much more obscure than this. It was not intended by the XIVth amendment to prevent a state from changing its system of taxation in all proper ways; it may, if it chooses, exempt certain classes of property altogether, it may tax real and personal property in a different manner, may tax visible property and not tax securities, and may allow or not allow deductions for indebtedness. All such regulations, and those of like character, so long as they proceed within reasonable lines and general usage, are within the discretion of the state legislature, or the people of the state in framing their state constitution."

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In the still more recent case of *Coulter v. Louisville & N. R. Co.* 196 U. S. 599, 25 Sup. Ct. 342, the same doctrine is indorsed quite broadly, as the quotation from the former decision would indicate. The following are in harmony therewith and in general indicate that the federal supreme court does not assume to deal with state laws, under the XIVth amendment, that fall with any fairness within the field of classification: *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533; *Adams Exp. Co. v. Ohio State Auditor,* 165 U. S. 194, 17 Sup. Ct. 305; *Magoun v. Ill. T. & Sav. Bank,* 170 U. S. 283, 18 Sup. Ct. 594; *Merchants' & M. Bank v. Pennsylvania,* 167 U. S. 461, 17 Sup. Ct. 829; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255; *Clark v. Titusville,* 184 U. S. 329, 22 Sup. Ct. 382; *Home Ins. Co. v. New York,* 134 U. S. 594, 10 Sup. Ct. 593; *Billings v. Illinois,* 188 U. S. 97, 23 Sup. Ct. 272; *New York v. Barker,* 179 U. S. 279, 21 Sup. Ct. 121; *Travellers' Ins. Co. v. Connecticut,* 185 U. S. 364, 22 Sup. Ct. 673; *Turpin v. Lemon,* 187 U. S. 51, 23 Sup. Ct. 20.

In view of the foregoing it could hardly be expected that the *Santa Clara Co. Case* and its companion case would be regarded, in the situation before us, as very persuasive as to condemning the law in question under sec. 1, art. VIII, of our constitution. If it stand the test of that it will necessarily pass the test of all other constitutional equality provisions which counsel for appellant claim condemn it.

If it were not for the great importance of this case, and the painstaking presentation of this particular question by counsel for appellant, we should have felt warranted in saying, with brief discussion of the matter, that it is ruled by the *Wis. Cent. R. Co. Case,* 52 Wis. 37, 8 N. W. 833, and *Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044. In the latter the law exempting from taxation all dues from insolvent debtors while taxing dues from solvent debtors, upon a careful study of the subject, was held legitimate under

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sec. 1, art. VIII, and it was shown that practical construction, in that regard, in this state, extended over a period of more than fifty years, supported that view.

The law in question, with some exceptions, specializes as to mortgages on real property. The necessary effect, as indicated, is to exempt from taxation so much of the indebtedness secured by such mortgages as is represented by the value of the security, and substitute the latter for the property exempted, assessing the same to the mortgagee or the mortgagor, at the option of the latter. The ostensible purpose, at least, of such legislation is to make the owner of the mortgage indebtedness bear, proportionally to his interest, so called, in the property, the burden of taxation thereon; but there is no escaping the ultimate effect, as indicated, and the legislature must be presumed to have intended it. The wisdom of the enactment is not a matter for the court to deal with. Experimental and theoretical economists, and those who assume that natural laws can be turned aside by an act of the law-making power, have the same right to their day as other people, and, in so far as their notions shall obtain legislative sanction and do not violate the fundamental law, the court must enforce them, regardless of its view of the matter from the practical standpoint, with the same fidelity as it enforces any other enactment. The one here, within the language of the supreme court above quoted, is according to the now somewhat general usage.

In recent years the species of legislation of which the act before us is a type has had very many advocates. Some have approached the matter, favorably, from one point of view and with one motive and some from another point and with another motive. The one have thought to relieve the debtor from a burden, casting it on the creditor, while the other have thought to relieve the creditor while ostensibly relieving the debtor, believing that in the end the latter would inevitably be the one chiefly benefited. The persuasive idea,

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all the time kept in evidence, is that mortgage taxation is double taxation and should be avoided as unjust; that to tax the mortgage, taking the value of the security from the value of the land, otherwise necessarily taxable to the mortgagor, in a measure would relieve the latter. There has been much legislation of that sort, and it has been generally sustained. The following would seem to be unmistakable evidence that classification, as between indebtedness secured by mortgages on real estate and other indebtedness for purposes of taxation, is widely recognized as proper: *Firemen's F. Ins. Co. v. Comm.* 137 Mass. 80; *State v. Runyon,* 41 N. J. Law, 98; *Common Council v. Board of Assessors,* 91 Mich. 78, 51 N. W. 787; *State v. Darcy,* 51 N. J. Law, 140, 145, 16 Atl. 160; *People ex rel. Jefferson v. Smith,* 88 N. Y. 576, 585; *Savings & Loan Soc. v. Multnomah Co.* 169 U. S. 421, 18 Sup. Ct. 392; 1 Cooley, Taxation (3d ed.) 272, 273.

(C) If we assume that the mortgages, so called, of railway property are of the same general class as mortgages of realty generally, in that they are to some extent at least on lands, there would still be a very wide distinction between them and ordinary mortgages. The railroad mortgages, so called, are as a rule trust deeds, securing millions of dollars in bonds distributed over a wide extent of country, and in many cases among the people in many countries, the owners, in the aggregate, numbering up into the thousands. It is easily seen that to apply such a law as the one in question to such a situation, requiring each bondholder to be regarded as the owner of so much, in value, of the railroad property as his bonds called for, and to tax him accordingly, would be more than impracticable, it would be impossible as regards producing any real beneficial results. The differences between the railway mortgage indebtedness and ordinary mortgages on realty are very marked. Moreover, it cannot be considered that the former are, in a legal sense, on real property. If the point made by counsel would be good for anything, it

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would apply to indebtedness secured on personal property, generally speaking, or indebtedness unsecured, as well as to the railway company indebtedness secured by trust deed.

In dealing with this subject it is to be remembered, at every step, that while this court has held, and now affirms most decidedly, that there cannot be any classification of property under sec. 1, art. VIII, for different rules or rates of taxation, a latitude, under the constitution, stopping only at the boundaries of reason, exists for the classification of property as between that to be taxed and that not to be taxed, and on that branch of the subject the authorities with which the books, state and national, are replete are in point, whether treating of such classification as is permissible here or the classification for different rates and different rules, as is permissible in many jurisdictions.

(D) Our attention is called to that feature of the act requiring the rate of taxation to be applied to railway property to be determined with reference to conditions existing the year previous to the year the tax is imposed, while the burdens imposed on general property in any year are determined with reference to the conditions then existing. That matter is particularly suggested as fatal under sec. 5, art. VIII. What we have said as to the requirements of that section leaves the matter now only important under the equality clause of art. VIII.

As we have seen, uniformity of rule looks to uniformity of burden, not to uniformity in mere methods of laying the burden. It was apparent to the legislature, in considering the subject which resulted in the enactment in question, that it would necessarily take so much time to fairly assess the railroad property and determine the average rate of taxation to be applied thereto that, if the work was to be done with any reasonable degree of accuracy, the circumstances regulating the rate as to general property one year would have to be applied to railway property the succeeding year.

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The proceedings in this instance, from the time the state board of assessors commenced its work till the rate of taxation was finally determined, covered a period of about one year and a half. It is perfectly feasible as to general property to levy the taxes of one year with reference to the valuation of property and the public needs in that year. As to railway property, if the burdens imposed on general property are to be taken as the basis for those imposed upon the latter, a delay in levying the tax, into the next year, is unavoidable. The legislature may well have considered that the average rate of taxation throughout the state would not vary materially as between one year and the succeeding year, and therefore, to give the board of assessors ample time to determine all the facts involved in the average rate of taxation on general property as to one year, with the highest degree of certainty attainable, and apply the result upon the value of the railway property ascertained as of such year the succeeding year, the result would more nearly approach the standard of equality required by the constitution than any other method that could be used. That the result falls within the scope of the discretionary authority of the legislature seems plain.

(E) The further special argument is made under sec. 1, art. VIII, that the law in question is unconstitutional in that it provides for taxing railway property at a different rate than general property. In support of that *Pingree v. Auditor General,* 120 Mich. 95, 78 N. W. 1025, is referred to as having passed upon precisely the same question under precisely the same conditions. That case dealt with a law for taxing telegraph and telephone lines on the *ad valorem* plan. The state treasurer, auditor, and commissioner of the land office were required during a stated time to value the property of the companies mentioned in the act, and at the same time to determine the rate of taxation to be imposed thereon, the same to be the average rate of taxation for all purposes

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imposed on general property throughout the state the previous year, the rate to be determined from the records and files in the auditor's office. The court condemned the law because, as was supposed, it contemplated the imposition of a state tax only upon one kind of property, the rate to be determined in a different way and to be other than that imposed on other property for the same purposes. We are not concerned with the question of whether the Michigan court properly construed the law. It proceeded to the result reached without any attempt to carefully analyze the enactment. Maybe no such analysis was needed. The result is of no consequence in our investigations unless our law receive the same construction as that given to the Michigan act. We may well concede that if *the same construction should be given to our law,* we would reach the same result as the Michigan court did. *Assuming* that the construction so given to the Michigan law is correct, there are such differences between it and ours as, under the circumstances, to warrant a different meaning being read out of the latter. The two are identical in some respects; they are identical as to the basis of the rate to be applied to the special property, as to the manner, generally speaking, the value of the special property is to be determined, as to the rate to be applied to the latter one year being based on the average rate of taxation on general property the previous year, and the feature as to payment of the tax on the special property to the state treasurer. But our act is widely different in administrative features. It shows a broad, comprehensive plan, having for its evident purpose the taxing of railway property, in effect, for all state and local purposes the same as other property is taxed. If the literal sense of the law would suggest the meaning accorded to the Michigan law, that of itself would raise an ambiguity suggesting and warranting judicial construction.

It must be presumed that the legislature intended to make a valid law. It must be construed in the light of history, the

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manifest object in view, and all circumstances furnishing any light as to the real legislative intent. No construction should be adopted rendering a law invalid if, under all the circumstances, a meaning can be read therefrom, reasonably, which will render it valid. As is commonly said, the intent of an act, when discovered, if found expressed in any reasonable view of its words, is to be deemed to be as efficiently incorporated therein, by implication, as if expressed by words taken in their literal sense. To that end the terms of a law can be given a literal or a strict construction and the literal sense of words can be violated, as may seem best calculated to carry out the real purpose of the law-makers. *Ogden v. Glidden,* 9 Wis. 46; *Blunt v. Walker,* 11 Wis. 334; *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 127, 74 N. W. 544; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 659, 79 N. W. 422; *Hoffman v. Maffioli,* 104 Wis. 630, 640, 80 N. W. 1032.

We cannot be blind to the matter of common knowledge that the act in question was passed as the result of years of agitation of the question of imposing tax burdens upon railway property the same as upon all other property; to take the former out of the class taxed indirectly, independently of sec. 1, art. VIII, and which, as was supposed, was specially favored in that regard, and put it with property directly taxed under such section and, necessarily, to apply thereto the rule of uniformity ordained thereby. The law was not enacted for the primary purpose, as is evident, to make railway property bear a greater burden than before, or a different burden than general property, or for the mere purpose of imposing thereon strictly state taxes. Right the reverse, it was designed to make such property bear equally, dollar for dollar of value, with general property throughout the state prescribed by the legislature for taxation, state, county, city, and all other tax burdens imposed directly on property. That purpose, easily seen in the enactment, should prevail regardless of the mere method adopted by the legis-

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lature to effect it, resulting in all taxes collected from railway property being paid to the state treasurer and then regarded as a substitute for state tax, levied in the ordinary way in part, and in part as an equivalent for state taxes in effect imposed on localities and there retained as a just exchange with the state, the state acting as an agency for the former and they as agencies for the latter, the results being sufficiently transferred from the one to the other, so that each would obtain its own by the constructive exchange of equivalents.

In working out the supremely complex problem of how best to tax railway property, under the constitutional rule of uniformity, a problem which has vexed legislatures and courts throughout the country for fifty years or more, as we have before indicated, the legislature has a wide discretion. The necessity for treating railroad property differently from general property as to mere method of attaining the constitutional object, is manifest. That necessity implies more than mere permission; it implies a constitutional command. All reasonable effort to respond to that command, instead of violating the constitutional rule, promotes the very equality it was designed to secure.

(F) There was a suggestion made that the law is invalid for not providing for notice of the proceedings to determine the average rate of taxation upon general property of the state. We cannot see any infirmity in the law in that respect, either under the constitutional requirement for due process of law or under sec. 1, art. VIII, or any other constitutional provision, state or national. No judicial proceedings, or proceedings of a judicial nature, are contemplated in determining the mere rate of taxation upon general property. The duties contemplated are of a ministerial nature only. No notice is ever given as to any ordinary proceeding in respect to determining the rate of taxation on general property in the local taxing districts. In that re-

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spect the owner of special property bears the same relation to the state board as the owners of general property do to the ministerial officers in the local taxing districts. The latter, from data previously provided for their use or which they provide by the mere ascertainment of facts, not requiring the performance of judicial duties, perform the work assigned to them by the law.

The terms of the act in question on that are plain.

"The board . . . upon returns . . . from county, town, city and village officers, or both, shall ascertain and determine the aggregate tax in the whole state for state, county and local purposes levied on the general property of the state, excluding special assessments on property for local improvements, and . . . the amount thereof shall be entered on the records of the board. From the aggregate true cash value of the general property of the state, and the aggregate of taxes so determined, . . . the board shall compute and determine the average rate of taxation, state, county and local consolidated, by dividing the aggregate taxes by the aggregate true cash value, etc., . . . which said rate so arrived at and determined, shall be entered upon the records of the board and shall constitute the rate of taxation on the true cash value of the property of the railroad companies liable to taxation under this act."

It seems impossible to read therefrom a requirement for the exercise of any judicial or legislative power.

The same view as above is expressed in regard to precisely the same kind of a provision in the Michigan railroad tax law in *Board of Ed. v. State Board,* 133 Mich. 116, 94 N. W. 668, and *Michigan Railroad Tax Cases,* 138 Fed. 223, 233–235, the latter case being affirmed on appeal to the federal supreme court. In the federal circuit court it was said:

"The rate is fixed by the constitution of the state of Michigan and the legislature. The duty imposed by the constitution and the statute upon the state board of assessors to assess and determine the average rate levied upon other property upon which *ad valorem* taxes are to be assessed is ministerial,

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and consists of mathematical calculations. There is, then, no more discretion in the state board of assessors than if the rate had been named in the constitution and statute."

The conclusion in the cases cited, in conformity to elementary principles, is that, in the circumstances contemplated by the statute, no notice to taxpayers is required. 1 Cooley, Taxation (3d ed.) 59; *Hagar v. Reclamation Dist.* 111 U. S. 701, 4 Sup. Ct. 663; *Spencer v. Merchant,* 125 U. S. 345, 8 Sup. Ct. 921; *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112, 174, 17 Sup. Ct. 56.

Moreover, the law provides, in addition to affording a hearing to owners of railroad property on the preliminary assessment, that the board shall meet at the state capitol at Madison, on the second Tuesday of November in each year, and continue in session from day to day unless adjourned for a longer time, for such period as is necessary, not later than the 15th day of December following, for the purpose of reviewing the valuation and assessment of railroad property and the valuation of the general property of the state, and further that during such period any railroad company interested may appear and be heard as to the value of and assessment of the property of such company *and the tax to be levied thereon,* and as to general property of the state. It appears by the record that such provisions were complied with in every respect. A date being thus fixed in such a law for sessions of the board, when interested parties may appear and be heard on all questions in respect to which they have any interest, no other notice to them is required unless the written law prescribes otherwise. *Kentucky Railroad Tax Cases,* 115 U. S. 321, 6 Sup. Ct. 57; *Pittsburgh, C., C. & St. L. R. Co. v. Backus,* 154 U. S. 421, 14 Sup. Ct. 1114; *Chicago, B. & Q. R. Co. v. Richardson Co.* (Neb.) 100 N. W. 950.

(G) Reference is made as to the facts as to street railway property, and particularly that of interurban railroads oper-

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ated by electricity, and some other property not belonging to railway companies, having to do with transportation of some sort, being taxed by a different method than ordinary railroad property, as violating the constitutional rule of uniformity. That seems to be sufficiently answered by what is said elsewhere in this opinion, as to the right of the legislature to classify property under sec. 1, art. VIII, some to be taxed and some to be exempt, so long as each particular class or subclass has real distinctions, reasonably specializing it as to other property. The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason. Again, we point to *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, as an indication of the scope of that power as here recognized. Applying the circumstances there held to warrant specializing as to part of a subclass of property owned by a single corporation as a test here, the legitimacy of that as between electric railway property and other property mentioned, and ordinary railway property, becomes at once apparent.

True, the rights granted to electric railway corporations, and business done by some of them, now approach more nearly to those of ordinary railway corporations than formerly, but there are yet quite radical differences. That is recognized in the degree of legislative regulation and control here and generally exercised over the latter, not exercised over the former. It finds its justification in the right of classification under constitutional equality clauses, by reason of there being real differences between the two kinds of property, which right, as we have seen all through our discussion, applies to sec. 1, art. VIII, so far as relates to the division between property to be taxed and property not to be taxed. The authorities cited by the circuit judge in his opinion are quite ample on this point. *Chicago & N. W. R. Co. v. Osh-*

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kosh, A. & B. W. R. Co. 107 Wis. 192, 83 N. W. 294; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 42, 69 N. W. 794; *People ex rel. Metropolitan St. R. Co. v. State Board,* 199 U. S. 1, 25 Sup. Ct. 705; *Pacific Exp. Co. v. Seibert,* 142 U. S. 339, 12 Sup. Ct. 250; *Michigan Railroad Tax Cases,* 138 Fed. 223; *Savannah, T. & I. of H. R. Co. v. Savannah,* 198 U. S. 392, 25 Sup. Ct. 690.

It appears inadvisable to further discuss this branch of the case. No court has yet held, and until great changes occur none is liable to hold, under any of the equality clauses of state or national constitution, that electric railway property, or any of the kinds of property suggested to our attention, must necessarily be classed with ordinary railway property in making a division between property to be taxed directly and that to be exempt from taxation entirely or taxed indirectly, or as to mere details of applying the rule of uniformity to the two classes of property when taxed directly, so as to produce practical equality in results.

(H) Much of the argument of counsel for appellant is centered on the ideas that railway property is wholly located where its visible property is situated, or at least there and where its offices are located; that it is a principle generally recognized; and necessarily so, in fixing the situs of all property for taxation, that it must be located by the law within the boundaries of those minor subdivisions of the state where it or its owner receives, to some degree at least, in some reasonable view of the matter, the benefits of the civil government exacting the tax; and that in disregard of that principle as to railway property, the law in question violates both sec. 1, art. VIII, requiring the rule of taxation to be uniform, and sec. 13, art. I, prohibiting the taking of property for public use without due process of law, and other constitutional guaranties as to equality before the law. The discussion of the subject under this head is sufficient for all.

Counsel assume, not without warrant, that the effect of the

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law is to give to the special property a general situs. If the claim be sound, that the basis of the right to tax is benefits received by the person taxed, as to his person or property, and therefore that the latter cannot be legitimately given a situs for the imposition of tax burdens beyond the boundaries of the taxing district where the property, or the owner thereof, or his agent or office, is located,—beyond where the property may be reasonably said to be constructively or actually located,—and as to railway property that such location is confined to the territory through which the road runs and where its place or places of business, its office or offices, are located, and the effect of the law is as claimed, that is, that it gives to railway property a situs for taxation in every district in the state in the proportion that the assessed value of the general property subject to taxation in such taxing districts, respectively, bears to the entire assessed value of the railway property, then the conclusion that the law is void under both of the constitutional provisions specially mentioned would be unavoidable, and it would be significantly so as to violating the constitutional requirement that "the rule of taxation shall be uniform."

The learned circuit judge, as we have before seen, met this phase of the case, as also counsel for respondents now do, by the doctrine, supposed by them to be the law of this state, but which we were compelled to utterly reject early in this opinion, that it is competent for the legislature, under sec. 1, art. VIII, to classify property prescribed for direct taxation, making a uniform rule for one class and a second such rule for another, and so on, without limitation as to number of classes except the extent of legitimate differences, resulting in different rules and different rates of taxation. If the law had no more secure foundation to rest upon than that, it certainly could not survive the judicial test. Unless it can be seen that, under the rules heretofore laid down as to the scope and meaning of sec. 1, art. VIII, the law in question con-

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templates substantial uniformity, actual uniformity so far as in the judgment of the legislature that is attainable as between the two great classes of property prescribed for direct taxation, and that the treatment of each class by a method uniform as to that class only, but both aimed at the same general result: to make every dollar in value of the two classes, regarded as one, bear the same burden of taxation, state, county, town, and so on down to the smallest and least important taxing district throughout the state, as every other dollar of such value bears, having regard to differences and circumstances as to taxing districts,—then it cannot be sustained. That broad principle so strongly contended for by counsel for appellant meets with our unqualified approval, and is deemed to have been, as before said, the position of this court from the first instance of its being called upon to necessarily deal with the question.

From the point of view stated the law must stand or fall. It were better that the latter alternative should occur than that the valuable safeguard against oppression so firmly intrenched in our constitution should be broken down by the tribunal especially charged with the duty of guarding it, or frittered away by following the reasoning in decisions elsewhere, under constitutions expressly, or by clear implication, providing for or permitting numerous rules and rates for taxation.

Written constitutions are the bulwarks of civil liberty. In contemplation, they are supposed to be proof against all legislative assaults upon those boundaries definitely fixed thereby, to pass which would endanger that safety of persons and property for which governments are established. However, no constitution can be stronger than the tribunal created thereby to guard it. It is not self-executing, nor is it self-protecting; the legislature must vitalize its provisions and the courts must protect it.

We may justly look with pride upon the manner in which

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the duty, indicated, was performed in regard to the important equality clause under consideration, when its true meaning was proclaimed in 1859. The vigorous language of Chief Justice DIXON on that important occasion, speaking for the court, was well calculated, as it was doubtless designed, to leave no manner of doubt for the future as to whether the way was open to discriminate between the burdens to be cast upon different kinds of property. Doubtless it was seen that if such way was left open there would be constant pressure to obtain the advantage of it, and, in the struggle, the large and powerful would inevitably oppress the weak. All that is clearly manifested by the language of the chief justice in connection with that heretofore quoted in this opinion, as to the section under discussion contemplating but one class of property for direct taxation, and one rate of taxation, having regard only to differences in expenses peculiar to localities. He thus emphasized the position of the court:

"We are of the opinion that these are the very mischiefs which they intended to guard against and prevent. Single individuals have seldom acquired such an influence over the legislative mind as to secure to themselves the advantages arising from such legislation. There was little danger to be apprehended from that source; but the combined influence and efforts of corporations and classes had. Such evils had been sorely felt in many of the older states. It was against them and all other unjust discriminations that the people intended to provide." "This principle of justice and equality which requires that each person should contribute toward the public expenses his proportionate share according to the advantages which he receives lies at the foundation of our political system and, in our opinion, it was to give it a greater permanency and force, and to secure its more rigid observance, that the section above quoted was introduced into the constitution."

If it were not for the significance of the doctrine as above

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stated, distinguishing our constitution from those permitting the very thing the framers of the former so industriously endeavored to prevent, we might rest this branch of the case, and no doubt many other phases of it, on the authority of the late case in the Michigan supreme court, and the analysis of the Michigan railroad tax law in the two cited federal cases. It is upon this difference in position, largely, as it seems, that counsel for appellant ground their hopes. So this case requires to be treated somewhat independently from those, though in principle, after all, it would seem that the latter might be well said to furnish a sure ground for the decision here.

As we have indicated, the purpose of the law was to effect the very object above said to be the only one permissible under our constitution. In the language of Judge WANTY in deciding the Michigan case in the federal circuit court, "This seems not to have been a scheme to produce inequality but a carefully devised scheme to distribute the burdens of taxation equally upon all taxpayers." The idea was to put all property taxed, directly, on a basis of equality as to purpose and rate of taxation. Did it fail in that by treating the railway property as having a general situs and applying thereto the average rate of taxation imposed on general property prescribed for taxation throughout the state? That is really what this case, in all its features, ultimately comes down to. The purpose being as indicated, if it legitimately fixed the situs of the special property, then most of the contentions of counsel for appellant fail with the one that it was not. In further discussion, in the main, we will assume that the law must necessarily be regarded as an attempt to give to railway property the broad general situs counsel for appellant claim.

Counsel for respondents suggest that the law created a taxing district composed of the whole state, as regards railway property, to tax it in a different manner and by a differ-

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ent rate from the manner and rate as to general property, and that the legislature had full power to do so. On that *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 396, is cited. It does not seem, however, to meet the case at all, since it dealt only with the creation of taxing districts with reference to particular purposes of taxation of local interest specially, but of general interest as well. It is also said, in the learned circuit court's opinion, that the character of the law is as counsel for respondents so contend. There is also a suggestion that the special property was given a situs at the seat of government for the special purpose of a state tax, and for the reasons suggested that the tax is in the nature of a franchise tax. What has already been said requires the rejection of all these theories without further discussion. They are based on the mistaken idea that there may be classification of property under our constitution for direct taxation by different rules and rates.

At the outset it may be conceded, as the fact is, that the constitution does not permit of any wholly arbitrary, capricious location of property for taxation. The burden of effecting a strictly state purpose cannot be imposed on a particular locality or localities, nor the burden of those things which are purely local be imposed on persons or property wholly beyond the boundaries of the municipality concerned, except in such special cases of assumption of the burden by the people under legislative authority. *Lund v. Chippewa Co.* 93 Wis. 640, 67 N. W. 927. We indorse to the fullest extent the doctrine so forcibly stated by Judge Cooley, and relied upon with so much confidence by the learned counsel for appellant, in these words:

"It can, therefore, be stated with emphasis that the burden of a tax must be made to rest upon the state at large or upon any particular district of the state according as the purpose for which it is levied is of general concern to the whole state or, on the other hand, pertains only to the particular district." 1 Cooley, Taxation (3d ed.) 225–227.

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The law in question must stand the test of that very valuable principle or go down under the condemnation of the constitutional provision in question, and several others.

The nature of railway property as to whether personal, real, or mixed, has very much to do with the question of where it may legitimately be taxed. Counsel for appellant, while recognizing that, seemingly put aside as absurd the doctrine which has become quite general, that the property of a railway corporation, as a whole, is to be deemed to be all personalty. It is quite familiar that, generally speaking, land and all things attached or appertaining thereto are realty, and all other property, tangible or intangible, with the rights connected therewith and appertaining thereto, are personalty. Those general principles have their exceptions. By intention things fixed to realty and in a sense physically a part thereof may be deemed to be personalty. By the union of land with rights granted by the public classed as personalty, forming a thing of itself in which the personal element predominates and which could not be separated from the other element without disintegration to the point of destruction and to the detriment of public and private interests as well, the combination may be deemed to be personalty of an inseparable nature. So, as we have seen, while a railroad system is largely land and tangible things of a movable character attached or appurtenant thereto, the thing that gives the great value and special character to the whole is the franchise element, creating the public duty; so such special element is deemed to be the principal thing, impressing all minor parts with its character, and making the entire combination one entire machine of a personal nature. That was well settled by the decisions of this court long before the law in question was framed. So, as to giving a legislative situs to railway property, the law must be tested in the light of dealing with personalty.

There is nothing particularly novel in the doctrine above

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indicated. It is the generally accepted doctrine elsewhere. It has found place in statutes, but only in recognition of judicial policy. Sec. 8281, Kansas Gen. Stats. 1905; sec. 1037*a*, Stats. 1898. It is the logical basis of the numerous decisions holding it to be necessary to justice and uniformity of rule in taxing laws, that the property of a railway corporation be assessed as a unit; the physical things being regarded as merged in that produced by union with the franchise element: the one of primary importance. *State Railroad Tax Cases,* 92 U. S. 575, 607; *Carlisle v. Pullman P. C. Co.* 8 Colo. 320, 7 Pac. 164; *Dubuque v. Ill. Cent. R. Co.* 39 Iowa, 56; *State ex rel. K. C., St. J. & C. B. R. Co. v. Severance,* 55 Mo. 378; *People ex rel. Iron S. M. Co. v. Henderson,* 12 Colo. 369, 21 Pac. 144; *Ames v. People,* 26 Colo. 83, 56 Pac. 656; *Chicago & A. R. Co. v. People,* 129 Ill. 571, 22 N. E. 864, 25 N. E. 5; *Shenandoah Valley R. Co. v. Clarke Co.* 78 Va. 269; *Missouri River, Ft. S. & G. R. Co. v. Morris,* 7 Kan. 210; *Franklin Co. v. Nashville, C. & St. L. R. Co.* 12 Lea, 521; *Columbus S. R. Co. v. Wright,* 151 U. S. 470, 14 Sup. Ct. 396; *Missouri, K. & T. R. Co. v. Board of Comm'rs,* 9 Kan. App. 545, 59 Pac. 383.

In the latter case the court said: "All property used or held by a railroad company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property." The opinions in several of the cases cited lay down most clearly the doctrine that the physical things of a railway corporation follow the franchise.

The broad discretion which the legislature has within the boundaries of the rule of uniformity in determining the situs of personal property for taxation, has already been referred to. The mere circumstance of the location of the agent of the owner is regarded sufficient to warrant assessing there large amounts of personal property located in different parts of the state, long distances therefrom and in jurisdictions

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having no connection, except through the sovereignty of the state, with the legislative situs. The simple circumstance of the location of the agent is deemed to satisfy the rule contended for by counsel. Again, the situs for taxation of large amounts of personal property is commonly fixed by the legislature at the principal place of business of the corporation as named in its articles of incorporation. Sec. 1041, Stats. 1898; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 564, 63 N. W. 746. Again, saw-logs are given the situs of the particular mill where the owner on the 1st day of May in the year of the assessment designs to have them manufactured, though he may have no interest in the mill whatever and have only formed a mental purpose to so manufacture the property. All these provisions and others of a similar character, with judicial approval, have existed in this state and elsewhere for years and some of them here ever since the state was organized. All are so familiar therewith that it is useless to refer to the decisions that have dealt with the matter. The situation amply illustrates the very broad limits of the principle that property can only be taxed where it is constructively or actually located, the farthest limits being where benefits reasonably appreciable of some sort are received by the person taxed, either in his person or his property.

The result of the foregoing is that personal property may have a twofold situs: one which is actual, tested by common-law principles, and one which is purely legislative, the latter stopping at the point where to go further would be to pass into the realms of mere caprice or arbitrary action, in that it would have no basis in the nature of the mutual exchange of benefits between the source of the taxing power and the person upon whom the burden is cast.

Sometimes it is said that property must be taxed at its situs, that meaning, of course, the actual situs unless the legislature has fixed another, acting within constitutional limita-

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tions. In *State ex rel. K. C., St. J. & C. B. R. Co. v. Severance,* 55 Mo. 378, the prevailing rule on this subject is thus stated:

"It is claimed that the situs of the property is the home of the company where its chief office is located, and there it must be taxed. The proposition is undoubtedly true that where a corporation has its residence there the property of this description is liable to assessment and taxation, if the law has prescribed no different rule or regulation on the subject. This notion of the situs of personal property . . . is a legal fiction. It may be modified by the legislature."

In *State Railroad Tax Cases,* 92 U. S. 575, speaking on the same subject, the court said: "It is merely the law of the state which recognizes it." Enlarging upon that in connection with numerous illustrative authorities it was said in *Ames v. People,* 26 Colo. 83: "It is entirely competent for the legislature, unless restrained by the constitution, to fix for the purposes of taxation the situs of both real and personal property." The following are to the same effect: *Chamberlain v. Walter,* 60 Fed. 788; *Cincinnati, N. O. & T. P. R. Co. v. Comm.* 81 Ky. 492; *In re Apportionment of Tax,* 78 Mo. 596.

Without further discussing the fundamental principle governing the subject of situs of property for taxation, we will state this for our conclusion: In the absence of some statute regulating the situs of property for taxation, it is governed by the common law in regard to actual situs. It is competent, however, for the legislature to give thereto for the purposes of taxation any situs it sees fit, subject to the rule of uniformity and to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast, either directly or by reference to the property taxed, from which there can reasonably be seen reciprocal duties to accord benefits on the one hand, and to respond therefor on the other. Whether that relation does or does not exist in any given circum-

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stances is so conclusively a legislative question that nothing short of manifestly capricious action, amounting to a taking of property for a public use without just compensation, will justify judicial interference.

The franchise of a railway company originates with the people. It is a part of the sovereignty of the state intrusted to private hands, which become thereby public agencies with appropriate and important duties of a public nature. The answer to that, that the same is true of any public service corporation, is, it seems, beside the case, since it is universally recognized that railway corporations, because of the great magnitude of their operations, the dominating power which they possess in the business world referable to the special franchise feature of their property, the closeness of touch between them and every inhabitant of the state and every dollar in value of property therein, by reason of which their legitimate prosperity and that of the people, individually and collectively, are inseparably bound together, are, most significantly, a class apart from all other corporations, one much more nearly a part of the government itself, as it were, than any other *quasi*-public agency. Nothing of a semi-public nature in that regard approaches near enough to such special corporations to give any substantial opportunity, even, for comparison. Such special organizations touch the every-day life of every member of every community from the center to the most remote parts of the state. While they thus, so supremely over all other organizations, have to do, at all points, with the well-being of the people, to the same special degree they are dependent upon the people for support and protection. That support and protection as to an ordinary system by no means is confined to the particular counties, cities, and other governmental subdivisions through which the road runs. It reaches, incidentally at least, far beyond the same. By traffic connections and agencies of various sorts it reaches a broad expanse of country, in some cases a single

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line covering to some extent the whole state. Such corporations, in a very marked degree, are interested, in excess of corporations of any other sort, in the capacity of the state, directly and through its local agencies, in promoting and compelling good order. No other class is so subject to dangers which might require the strong arm of the whole people for its protection, or so constantly requires a large part of the time of state and local agencies in administering affairs in respect to matters upon which its welfare depends.

True, some railway corporations are small and so do not as significantly fill the picture thus presented as others, but they are of the same general class, have the same rights, and have the fullest opportunity the state can give them to enlarge the sphere of their operations. As a rule they connect in a way with some large system and are affected, generally speaking, by all the conditions which affect the larger organization.

Now, who can set the boundaries which shall accurately define the uttermost limits to which a great railway corporation extends, to some extent receiving some benefit arousing return duty? That the mere taxing districts through which the road runs cannot necessarily be the limit seems plain. We can well say, beyond any reasonable doubt, it extends beyond their boundaries; but who can set the limit beyond which, without any reasonable doubt, it cannot be reasonably said to extend? May not the confines of the state be reached in exploring for such limit, under the broad power of the legislature to fix the situs of personal property for taxation? No court has yet spoken unfavorably in respect thereto. All that have spoken on the subject seem to have inclined the other way.

True, the constitution of Michigan was amended after the decision in *Pingree v. Auditor General,* 120 Mich. 95, 78 N. W. 1025, but the amendment was in the nature of a mere proviso, apparently by way of construction, it would seem,

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declaring that the method of taxation condemned in the *Pingree Case* should be considered one for making railway property, on a basis with all other property in the state taxed by the *ad valorem* method, bear its relative proportion of all taxes, state and local. Other states have quite similar laws. They are referred to, in connection with ours, in the decision in the federal circuit and supreme court to which we have referred. Those mentioned are Michigan, New Hampshire, Missouri, and Wisconsin. In that connection, and as supporting the principle of the law in question, reference is made to *State ex rel. Brown v. Mo. Pac. R. Co.* 92 Mo. 137, 6 S. W. 862; *Chicago & A. R. Co. v. Lamkin,* 97 Mo. 496, 10 S. W. 200; *State ex rel. Gottlieb v. Metropolitan St. R. Co.* 161 Mo. 189, 199, 61 S. W. 603; *Boston, C. & M. R. Co. v. State,* 60 N. H. 87. Particular force was given, in the federal circuit court, to the feature of the Missouri statute requiring all school taxes for the several districts in each county in which railway property is taxed, to be laid on the value of such property distributed to such county, on the average-rate plan. Manifestly the principle is the same, whether the average rate is applied to a county having districts where there is no railway line and others differently situated, as where it is applied to the whole state under the same circumstances.

In the New Hampshire case the idea which ruled the Michigan court in the *Pingree Case,* that an average-rate tax levied in the whole state and collected by the state and paid into the state treasury is a state tax necessarily, was not favored. It was in effect said that such a tax may or may not be wholly a state tax, according to the legislative purpose; that the matters of the assessment, levy, and collection are evidentiary circumstances, but not necessarily conclusive ones.

The history of the subject in Michigan leads to the conviction that if the question were presented there as an orig-

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inal matter, regardless of the change in the constitution since the *Pingree Case,* the average-rate law would be sustained. Such case turned wholly, as will be remembered, on the question of whether the tax was a state tax; on the construction of the law. The principle of the enactment, applied to a tax intended to be a state tax, and a local tax as well as to every taxing district in the state, on the basis of all other taxes, was quite clearly regarded to be sound. And so it was plainly regarded in the two federal decisions. In the federal circuit court every phase of the Michigan law that has to do with the constitutional rule of uniformity in taxation was examined and found not only to be consistent therewith, but significantly promotive of its object.

We are referred with confidence to *Union R. T. Co. v. Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, which related to the taxing of property in one state located permanently and used wholly outside thereof, where it had acquired a situs. The tax was condemned on principle, but we are unable to see how such principle affects this case, further than as we have heretofore indicated. The court said:

"If the taxing power be in no position to render any benefit to the person or property taxed, and such property be wholly within the taxing power of another state to which it may be said to owe allegiance, and to which it may look for protection, the taxation of such property within the domicile of the owner . . . is beyond the power of the legislature, and a taking of property without due process of law."

There is no disposition to overlook that salutary principle, but rather to recognize and confirm it. As indicated, we must assume that the legislature fully recognized that principle with reference to sec. 1, art. VIII, and all the constitutional provisions bearing on the question, and kept within such limitation, till the contrary appears beyond all reasonable doubt. In the broad, comprehensive view the legislature may, legitimately, have taken of the matter, it seems that it could

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reasonably have concluded, under all the circumstances, that the necessary equivalent would be rendered, or renderable when necessary, from every taxing district, to the property or the owner thereof, to support the corresponding duty to bear proportionally with all other taxpayers in such district the local and all other tax burdens, except such burdens as relate to the subject of special assessments, which are excluded by the law under consideration.

There is another aspect of this branch of the case which we have deemed worthy of consideration. It must be conceded that the only logical way to assess railway property is to value the system as one entire thing, personal in character, and that part in this state as a proportion of such one thing, the division to be made upon a proper basis. That has come to be accepted by all courts. Most states that have adopted that system have done so in connection with the distributive feature of apportioning the value of that part of the entire system in the state to the different taxing districts through which the road runs in the proportion which the length of main line in each such district bears to the entire length of main line in the state. That has been repeatedly sustained under constitutions requiring a uniform rule of taxation. Many of the cases that have dealt with the matter have been heretofore cited. The following are quite recent: *Ames v. People,* 26 Colo. 83, 56 Pac. 656; *State ex rel. Bee Bldg. Co. v. Savage,* 65 Neb. 714, 91 N. W. 716; *Chicago, B. & Q. R. Co. v. Richardson Co.* (Neb.) 100 N. W. 950; *State ex rel. Morton v. Back* (Neb.) 100 N. W. 952. To that extent the problem of taxing railway property was some years ago solved in many states, and the result came to be supposed to be the most rational and logical way discovered for reaching such property with the hand of the tax gatherer, consistent with the constitutional requirement of uniformity.

The doctrine that classification of property along reasonable lines,—as regards methods of making the assessment of

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different kinds of property, determining the rate of taxation, applying the same to the value ascertained and realizing the result, all the time working, reasonably, to the constitutional end of burdening, as near as practicable, each dollar in value of one kind of property the same as every other dollar in value of every other kind,—is in conformity with the constitutional command, and that such command has reference to uniformity of burdens and to uniformity of method only so far as the latter promotes the former, has been generally adopted. The doctrine has also been generally adopted, that what promotes the object of the rule of uniformity is primarily a legislative question and that its judgment is to prevail if possible, every reasonable intendment necessary to sustain its enactments being given thereto.

The foregoing leads up to this: If the distributive idea should have regard only to the taxing districts through which the road runs, may not the legislature have thought that to apply the average rate of taxation throughout the state to the value of railroad property, equalized with that of all other taxable property throughout the state, would be more likely, one year with another, to reach railway property on a nearer approach to absolute equality to other property than to use the average rate in the particular taxing districts through which the road runs, on the theory of a constructive distribution of the railroad property to such districts? The question is a very complicated one.

It must be kept in mind that the distribution plan was adopted not as the best method of taxing railway property on an equality with all other property, but as a better one than that of the license fee system, or the *ad valorem* system executed by means of local assessment of parts of a railway system by the various local assessors in the districts through which the road runs.

Who can say with any reasonable degree of certainty that on the distribution plan the mileage of main track in any

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particular taxing district would represent justly, as between the railway company and all taxing districts interested, the proportion of the entire value of the railway system which should be assessed in such district? The value of the railway property, looking at physical things, in a given taxing district might be $250,000 represented by one mile of main line, while the actual value in another district might be $100,000, represented by two miles of main line, and the value of the general property in the two districts be substantially equal, thus giving to one taxing district, apparently, five times the benefit, proportional to main track, given to the other. Many other illustrations might be suggested showing the great difficulty involved in any method as to reaching railway property for the purpose of taxation under the constitutional rule by a close approach to absolute equality. Of course, as we have seen, actual equality is unattainable. The best that can be done is to secure as near an approach thereto as practicable.

It seems that whether we regard the legislature as having treated the railroad property as having a general situs or one limited to the particular taxing district through which the road runs, we may well regard it as having kept within the boundaries of reason in determining that the average rate of taxation as to all general property in the state would be more likely to reach the special property equally with such general property than by the distribution plan.

We venture to say, there is much force in the claim that every expression of every court that has spoken on the subject, condemning as unreasonable to the point of absurdity all attempts at valuing a great railway system in small sections with regard to the particular taxing districts through which the road runs, may well be read as condemning, as a mere makeshift, the plan of dividing the value of that part of the system located in the state, having regard to the value of the entire system, into as many parts as there are such tax-

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ing districts, on the basis of the length of main line in them respectively. With one accord the courts say, every railway system is a unit, absolutely indivisible for the purpose of determining the value of the parts, the aggregate of such values to be that of the whole; that it is a thing so utterly different "from every other species of property that the discriminations made as between them and other corporations and individuals in the method or instrumentality by which the value is ascertained" are justifiable. *Chamberlain v. Walter,* 60 Fed. 788. Commonly it is said, valuation on the unit theory is necessary to the very object of the constitutional requirement of uniformity. Why does not the same reasoning, logically, require the value when once ascertained also to be treated as a unit, by applying thereto the average rate of taxation imposed upon all other property taxed by the *ad valorem* method in the state, instead of dividing it on an artificial basis into a multitude of parts: not much, if any, less unlikely to represent the actual value of the system in the respective taxing districts than valuations by local assessors, each appraising that part of such system found, as indicated by the visible part thereof, in his district?

The law is not to be condemned because we cannot see just how the legislature viewed the matter. So long as it can reasonably be seen that there is a view consistent with the law and the constitution, that is sufficient. Again, the law is not to be condemned because the average rate might possibly, or even probably, in an instance now and then, exceed the rate in some particular taxing district where some portion of the main line of a railroad is located. On that we cannot agree with the learned counsel for appellant. If the plan of the law be reasonably calculated to accomplish the constitutional object, that is sufficient. If it fails now and then in administration and yet may reasonably be said to have been designed to effect that practical equality which satisfies the constitutional requirement, that is enough. Uniform methods of

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treating all kinds of property as regards taxation would inevitably violate that uniformity of rule, referable to equality of burdens, which is the supreme feature of the constitutional requirement. The method of taxing railway property has for fifty years been going through a process of evolution. The problem which so perplexed those who had to deal with it at first was by them solved, temporarily, by resorting to the license fee system. That was simple and fairly fruitful, but illogical, and proved very unsatisfactory to the people. The difference in method of treating such property from that applied to property generally, was fraught with many evils, as the people came to believe. The plan of assessing each system of the special property as a unit, and dividing the value ascertained, between the taxing districts through which the road runs, upon some basis, generally that of length of main line, came into use in time. That rapidly gained favor till it was supposed, as it seems from judicial history, that some near approach to a fairly perfect system had at last been discovered. The states which adhered to the license system the longest, and thus had the benefit of the experience of others with the distributive plan, appear to have seen its chief defect to be in the assumption that a railroad system must necessarily be treated as a unit for the purpose of determining the value thereof with any reasonable degree of accuracy, and yet that such unit, represented by the ascertained value, may logically be divided into a multitude of parts and apportioned upon an artificial basis for the purposes of taxation among as many districts as are traversed, to any extent, by the railway track.

In the natural order of development the last to adopt the *ad valorem* system for taxing the special property took the unit plan for valuing such properties, so universally conceded to be essential, and took it entire, rejecting the distributive feature, which seemed to be manifestly inconsistent

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therewith. The idea indicated in the new order of laws is to value each railway property as one thing and on the same basis as other taxable property is valued, and to tax it on the same basis as such other property is taxed, throughout the state and as to each taxing district through which the road runs, as near as the same can be reasonably ascertained, keeping the results in the state treasury, upon the theory of a constructive accounting between the state and every taxing district which, in any reasonable view, would be entitled to any part thereof under the constitutional rule of uniformity. All upon the theory that, in practical effect, by so doing each dollar of every kind of property prescribed for direct taxation in every taxing district throughout the state would thereby be made to contribute its constitutional proportion of all taxes, state and local.

It is considered that the new method is a long step in advance of the distributive plan which counsel for appellant seem to think is the only method which is consistent with that real equality, or such near approach thereto as is practicable, which the fathers of the constitution endeavored to secure. When we appreciate the idea that mere uniformity of instrumentalities in accomplishing the constitutional object is not required; that it is not important except in so far as may be helpful in securing such object,—the doctrine that all property prescribed for direct taxation constitutes but a single class under the constitution, and that such one class must be taxed by the uniform rule ordained by the constitution, vitalized by the legislative essentials and promoted by reasonable legislative aids, seems to be incorporated into the law under consideration, and vindicated by the conclusion reached in this case.

The contention of counsel for appellant that the system of assessing each railway system as a unit, and sending to each taxing district a ratable proportion thereof, is the only proper

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way to legitimately and justly tax such property on the *ad valorem* plan, that each railway company should be required to deal with the multitude of taxing districts through which the road runs, covering in some cases a large part of the state, could not be taken seriously if it were not so vigorously and so confidently, as it appears, insisted upon. There can be little doubt, it would seem, from a careful review of the decisions in the federal circuit courts, but what the system embodied in the law before us was regarded by such courts as a distinct advance from the old method, in the line of that uniformity commanded by the constitution, and that such view was approved by the federal supreme court. It appears that the better way to promote that equality and justice to all, which the constitution guarantees, is to maintain the integrity of the unit system in its entirety in treating railway property for taxation, which we find, after a most careful study of all the attacks upon it, to stand the test of the constitution at all points.

There are several matters of detail in the briefs of counsel which we have not referred to, as was suggested must necessarily be the case at the outset. The major and minor points, including the illustrations used in the argument, cover a very broad field in a most exhaustive manner. That has seemed to render it necessary to respond, in the opinion, to all such major propositions at considerable length, in order to do justice to the case and to the eminent counsel who so ably prepared it on the side of the appellant, and that of the respondents as well. To the end that it may not be thought that anything material has been overlooked, though not found specially mentioned, it should be said that the four briefs have been carefully checked, page by page, to avoid such overlooking. It is believed that every suggestion of counsel upon either side has received the attention it deserves in the preparation of this opinion.

By the Court.—The judgment is affirmed.

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CASSODAY, C. J. (*concurring*). I fully concur in affirming the judgment in this case. It was tried before Judge HASTINGS, who has had much experience in matters of taxation. His written opinion on file herein is to my mind clear, exhaustive, and convincing. It is to be regretted that it was not printed for the convenience of the court. In that opinion he carefully lined up the decisions of this and other courts, and to my mind has clearly shown that under the uniformity clause of the constitution the legislature has power to classify property for the purposes of taxation and then to impose different rates of taxation upon the different classes of property. Such right of classification seems to have been conceded by counsel on both sides, but counsel for the plaintiff claimed that the classification made by the statutes was repugnant to the constitutional clause mentioned, because they imposed different rates of taxation upon the property of railway companies and other property. My own views in respect to such classification and imposition are sufficiently stated in my separate opinion in the case of *State v. Railway Cos., ante*, p. 449, 108 N. W. 594. That opinion suggests the extreme difficulty, if not impossibility, of sustaining the validity of ch. 315, Laws of 1903, and at the same time reviving and adhering to the rule declared by Chief Justice DIXON in *Knowlton v. Rock Co.* 9 Wis. 410, 420, 421. That rule very clearly required the course or mode of proceeding in levying or laying taxes in *all cases to be alike;* that the several *distinct steps* in the course of such proceeding *must each be uniform*—the *assessment* or *fixing the value* must be uniform, the *valuation* must be uniform, and the *rate* must be uniform; that uniformity in such a proceeding becomes *equality;* that there could be no uniform rule which was not at the same time *an equal rule, operating alike upon all the taxable property* throughout the territorial limits of the state, municipality, or local subdivision of the government within and for which the tax was to be raised. To my mind it is very plain

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that ch. 315, Laws of 1903, providing for the taxation of the property of each railroad company as a unit, could not be sustained under the rule so asserted forty-seven years ago. As I understand, the decision in this case is a wide departure from that rule. It is here held that "the rule of uniformity has reference to uniformity of burden, not necessarily uniformity of methods of imposing burdens and realizing thereon." On that theory, a license system which imposed the same burden as an *ad valorem* system would be within the rule of uniformity. So there is a wide departure from the rule so asserted in the *Knowlton Case,* as it seems to me, in holding, as I understand the court does hold in this case, that "the legislature may classify and subclassify property," for direct taxation, "to the extent of distinguishing differences as to a particular class or subclass, reasonably requiring special treatment to promote the constitutional requirement that as to all property taxed the rule of taxation shall be uniform." But, in view of my separate opinion in the penalty cases referred to (*ante,* p. 449), it is unnecessary to say more.

ALLEN, Appellant, vs. CITY OF MILWAUKEE and others, Respondents.

February 24—June 21, 1906.

Municipal corporations: Street improvements: Patented pavement: Competitive bids: Milwaukee city charter: Void contract: Rights of abutting owners: Temporary injunction: Foreign corporations: Contracts.

1. Under a city charter giving power to impose, by special assessment, upon abutting lots the cost of a street improvement only upon competitive bids, the city has no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word.

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2. Sec. 23, ch. V, of the Milwaukee city charter (giving the board of public works power, under the authority of the common council, to make contracts for the use of any patent or patented article or process at a stipulated sum or royalty, and thereupon to order any work, whether chargeable to the city or to lots, to be done with such patented article or process) requires the approval of the council for the acquirement of the right to use patented articles or processes, and that the subject shall have been so submitted for consideration by the council that there can be no reasonable doubt that the council has consciously and intentionally given the authority.
3. Said charter provision does not dispense with competitive bidding as an essential of the scheme for paving streets at the expense of abutting lots. It contemplates the acquisition of a right to operate under the patent for a royalty and then the letting of the actual work to the lowest bidder.
4. The patentee of a certain pavement filed with the board of public works of Milwaukee a proposal to the effect that any one contracting with the city to improve streets with said patented pavement should have the right to lay the same upon paying the patentee a certain sum per square yard, for which sum the patentee was not only to grant the right to use the patents, but was to prepare and furnish a large part of the material for the pavement, as well as an expert adviser. The common council directed the improvement of a street with such a pavement, and the assessment of a part of the cost upon abutting lots. A contract was let accordingly, the contractor being required to hold the city harmless against all claims or fees for any patented article used on the work. The sum to be paid the patentee under its proposal was about two thirds of the contract price for the pavement. *Held*, that no contract such as is authorized by sec. 23, ch. V, of the charter had been made with the patentee, and hence that there was no power to contract for work involving the use of the patent.
5. Where a contract for the improvement of a street was void and the invalidity was of a character likely to prejudice the owners of abutting lots in a manner and degree not readily separable from the burdens which might lawfully be imposed upon them, such a lotowner, who commenced his action promptly and before any work had been done, was entitled to a temporary injunction restraining payments on the contract or issuance of assessment certificates.
6. A taxpayer has the right to restrain the payment by city officers of money which the city does not owe.

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7. Sec. 1770*b*, Stats. 1898, providing that contracts of a foreign corporation which has not complied with the requirements of that section "shall be wholly void on its behalf," is to be enforced according to its words. So *held* as to a contract made two days before compliance with the statute.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Appeal from an order dissolving a temporary injunction. Plaintiff, a taxpayer and owner of real estate fronting on Jackson street in *Milwaukee,* brought action against the city, the members of the board of public works, and the contractor to enjoin the payment of any money by the city or the issue of any special assessment certificates or improvement bonds for grading and paving part of Jackson street under a contract with *The Central Bitulithic Paving Company.* It appeared that the board of public works reported to the common council that it was necessary to pave said street with "a permanent bitulithic pavement having a concrete foundation," and recommended proceeding to that end. The common council passed a resolution to subgrade and pave "with a permanent bitulithic pavement having concrete foundation," and provided for assessment of part of the cost thereof upon abutting lots and payment of the balance by orders on the city treasury. After such resolution the board of public works prepared specifications calling for, first, a six-inch concrete foundation; second, a two-inch wearing surface of finer stone mixed, according to minute specification, with "Warren's Brand Nos. 19 to 24 Bituminous Water Proof Cement or Bitulithic Cement;" third, a separate finish of "Warren's Quick Drying Bituminous Flush Coat Composition;" and, fourth, a layer of stone chips rolled into the last; as also the two preparations. A pavement so constructed and involving, with the concrete, the use of these special preparations together with the method and manner of laying it, is fully covered and controlled by patents be-

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longing to a corporation known as Warren Bros. Company. The names of the two compositions above quoted and the word "bitulithic" are tradenames registered under federal copyright laws. The specifications required that the contractor should protect and hold the city harmless against any and all claims or fees for any patented article or arrangement that might be used in connection with the work. It is alleged that Warren Bros. Company have organized some four subsidiary companies to whom it has conveyed the privilege of using its patents and laying pavement covered by the same, among which is the defendant contractor. Further, it appears that Warren Bros. Company had filed with the board of public works a proposal substantially to the effect that any one to whom contract for the paving might be awarded for improving the streets with "Warren's bitulithic pavement" should have the right to lay the same by paying Warren Bros. Company $1.40 per square yard for finished pavement, for which the latter agreed to mix and supply at Milwaukee the two-inch wearing surface; the flush coating cement and stone chips for flushing the wearing surface; and also to furnish an expert to give proper advice in course of the work; also to grant right to use all patents necessary to the work. The defendant contractor, a foreign corporation, had not complied with sec. 1770*b*, Stats. 1898, at the time of bidding or execution of the contract or final approval thereof by the comptroller, but did so comply two days after such last act and before suit was commenced. No work had been done under the contract at the time of commencement of suit. The contract provided for a price of $2.25 per yard for paving. Temporary injunction was issued *ex parte* and, after answer by all the defendants, same was dissolved on the ground, as stated by the circuit court, that it "has not sufficient doubt as to the regularity and integrity of the proceedings of the common council and board of public works to warrant it in continuing the injunction." Also, that the

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compliance with sec. 1770*b*, Stats. 1898, was sufficient. As a condition of dissolution, bonds were required, one to the city to protect it, and one to the plaintiff to protect him from "any damages sustained by reason of the dissolution of the injunction." Plaintiff appeals from such order.

For the appellant there were briefs by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.*

Carl Runge, city attorney, for the respondent *City of Milwaukee* and all other respondents except *The Central Bitulithic Paving Company.*

Arthur Jones, counsel for *The Central Bitulithic Paving Company.*

The following opinion was filed March 20, 1906:

DODGE, J. In *Dean v. Charlton,* 23 Wis. 590, this court decided that under charters which give power to the city to impose, by special assessment, upon abutting lots the cost of a street improvement only upon competitive bids, cities have no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. For nearly forty years the legislature has approved this construction of such grants of power by re-enacting them in substantially the same form and in some instances by making special provision for obtaining the benefits of patents. The authority of that case in this respect has not been contradicted. In *Kilvington v. Superior,* 83 Wis. 222, 53 N. W. 487, urged by respondents, the decision in no wise conflicts with the earlier case. It proceeds upon and gives effect to a distinction fully recognized in *Dean v. Charlton,* namely, that such general city powers as lighting streets, purchase of a fire engine, or destruction of garbage are generally and broadly conferred by other clauses of our city charters, and that as to them the requirement that purchases of materials or letting of work be done upon competitive bidding is merely regulative of a

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duty which the city government is bound to perform; and, as a result, that the legislature must be deemed not to have intended the requirement for competitive bidding to apply where it could not. The field is one of construction of our own statutes enacted after the rule of *Dean v. Charlton* was announced, so that views of courts in other jurisdictions upon their statutes are by no means controlling if even relevant. For *Milwaukee,* however, the legislature, evidently recognizing the rule of *Dean v. Charlton* as established generally, proceeded to provide a method of obtaining privileges under patents entirely consistent with all provisions elsewhere in the charter for competitive bidding. Without doubt that legislation was intended to exclude any other method of acquiring for the city the advantages of patented rights, articles, or processes for any purpose. *Ricketson v. Milwaukee,* 105 Wis. 591, 81 N. W. 864. That statute (sec. 23, ch. V, of present charter) provides:

"The said board shall have power, under the authority of the common council, to make a contract or contracts with the patentee or his licensees or assigns, to use any patent or patented article, process, combination, or work for the said city, at a stipulated sum or royalty for the use thereof. And thereupon the said board shall have power to order any work, whether chargeable to the said city or to lots, parts of lots, or parcels of land therein, to be done with the use of such patent or patented article, process, combination, or work; and whenever the owner or agent of any lot, part of lot, or parcel of land in said city, or other person authorized by law to do such work, shall do the same and use any such patent or patented article, process, combination, or work in doing the same, he shall pay to the said city the sum or royalty chargeable therefor; or the amount of such sum or royalty may be charged as a special assessment upon the respective lots, parts of lots, and parcels of land in front of which such patent was so used, and collected for the use of said city, as other special taxes are collected."

This enactment clearly intends, while permitting the city to acquire the right to use patented articles or processes by

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purchase of such right, to require approval of the council for such purchase, and, of course, that the subject shall have been so submitted for consideration by the council that no reasonable doubt that they have consciously and intentionally given the authority can arise. It is certainly debatable whether submission of the question of paving Jackson street with a "bitulithic pavement" as if there were several kinds which might be in competition, and a resolution merely in the affirmative, can be construed as an authority to the board of public works to contract for the privilege of laying "Warren's bitulithic pavement" covered by a patent. It is at least open to argument that the purpose of the board to make such contract was so obscured, if not concealed, that the subject may not have been purposely passed on by the council; especially in view of the prohibition imposed on the board by ch. 107, Laws of 1903, that no special brand of asphalt shall be required by name to be furnished in any specifications for street paving. We, however, need not decide this question, for it is also clear that sec. 23, ch. V, was enacted as a part of the whole charter and to enable the making of improvements in the manner and according to the scheme prescribed, although but for that section such other requirements would be inconsistent with a patented article or process. One essential of the scheme for paving streets at the abutters' expense is competitive bidding, and it is clear that sec. 23, ch. V, does not intend to dispense with that. It nowhere authorizes the contract for the work to be made with the person who, by reason of his patent, can exclude all other bidders, nor does it anywhere authorize imposition by special assessment of anything but the "royalty" which the city may pay by reason of the noncompetitive contract for the use of the patent authorized by that section, in addition to the cost of the work ascertained by competition under the other provisions of the charter. Obviously the legislative purpose contemplated, as to such work, the acquisition of a

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right to operate under the patent for a royalty and then, and only then, the letting of the actual work to the lowest bidder. Does the offer made by the patentee constitute any such contract, even conceding that the board of public works has so accepted that offer as to close a contract and that the council has authorized such action? It seems to us to come very far from it; indeed to disclose a studied attempt to evade the purpose of the charter so as to confer upon the patentee a contract for a large part of the work to be done without even the formality of any bidding therefor. It is to be noticed that nearly two thirds of the whole cost of the paving, viz., $1.40 out of $2.25, is to go to the patentee, and for that price it agrees to supply the crushed stone for the upper two inches of the pavement, to do the work at *Milwaukee* of sorting, coating, and mixing this stone with hot asphalt hour by hour as the work proceeds, to supply and prepare for laying the flushing coat in the same way, to furnish the stone chips for the final surface, and to hire an advisory expert for the progress of the work. Can the $1.40 per yard of pavement thus to be paid the patentee in any reasonable sense be termed "royalty" which, by the terms of sec. 23, ch. V, the city may include in, or add to, the special assessment, or does such work, in large part, fall within the "use of a patent, or patented article, process," etc., for which alone the city is so authorized to contract? Any such contention would be absurd. The bulk of the patentee's agreement is for doing the paving. If such a division of the work of an improvement can be dictated by the patentee, where must he stop in absorbing into his noncompetitive contract other parts of that work? May he not insist that crushed stone and cement for the six inches of concrete be purchased from him at his own price, or that his teams and rollers shall be employed to do the work, or that he alone perform still other parts of the work till the supposed competitive bidder is reduced to a mere name? If patentee may absorb two thirds of the work

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and price, we see no very logical stopping place short of complete nullification of the right of the lotowner to have competitive bidding, which, of course, is a valuable right, theoretically at least tending to lessen the cost. Indeed, under the terms of this proposal from Warren Bros. Company the city seems not to acquire the right to "use" the patent or process. The only offer on that subject is that the successful bidder, not the city, shall have the right to use the patents so far as necessary in laying the pavement. It is difficult to discover that this would confer any right on the city to use patent, process, or combination; and yet it probably must use them from time to time as the pavement may require resurfacing or other repair with the patented materials. These considerations lead us to the conclusion that no contract such as is authorized by sec. 23, ch. V, was made with the patentee or its assigns, hence that no jurisdiction was acquired to order, or contract for, the doing of the work involving the use of the patent, hence that the attempted contract with defendant *Central Bitulithic Paving Co.* was void.

Concluding, as we must, therefore, that no valid contract was ever made for doing this work, and that the invalidity was of a character highly likely to prejudice the plaintiff in manner and degree not readily separable from the burdens which might lawfully be imposed upon him, we must hold that the court should have enjoined the proceedings at once. When it is clear as matter of law that there can be but one result of a litigation, and that an act will be void if done, but harmful to the plaintiff meanwhile, the court should interpose to maintain the *status quo*. *Beaser v. Ashland,* 89 Wis. 28, 61 N. W. 77; *Liebermann v. Milwaukee,* 89 Wis. 336, 61 N. W. 1112; *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603. Plaintiff's right is entirely free from the obstacle found in *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542; and *Beaser v. Barber A.*

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P. Co. 120 Wis. 599, 98 N. W. 525, and many other cases, where the plaintiff stood by and allowed contractor to incur expense of a work without a warning, for here due promptness was exercised in notifying defendants of plaintiff's claim, both as taxpayer and lotowner, that the contractor could receive no pay, either in money from the city or in assessments against plaintiff's property, if he persisted in acting under his void contract; this action having been commenced before any work was done.

The reasons already stated which result in the conclusion that the contract attempted to be made by the board of public works was illegal and, therefore, void are supplemented by the provisions of sec. 1770*b*, Stats. 1898. This statute provides that contracts of a foreign corporation which has not complied with the requirements of that section "shall be wholly void on its behalf . . . but shall be enforcible against it." That such enactment is intended to be enforced according to its words was decided in *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904. Confessedly, when the contract in question was made, the defendant *Central Bitulithic Paving Co.* had not complied with the conditions of sec. 1770*b*, Stats. 1898. It has, therefore, no legal right to demand, nor is the city under any legal obligation to pay, any money by reason of the contract. The right of a taxpayer to enjoin the payment by city officers of money which the city does not owe is most thoroughly established by a long line of our own decisions, only a few of which need be cited. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Rice v. Milwaukee,* 100 Wis. 516, 76 N. W. 341; *Mulberger v. Beurhaus,* 102 Wis. 1, 8, 78 N. W. 402; *St. Croix Co. v. Webster,* 111 Wis. 270, 273, 87 N. W. 302; *Kircher v. Pederson,* 117 Wis. 68, 93 N. W. 813.

As the facts were all before the court, and left no reasonable doubt as to the final result, the temporary injunction against payment out of the city treasury of the moneys which

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would be due if the contract were valid should not have been dissolved.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

Upon a motion by the respondents for a rehearing there was a brief by *John T. Kelly,* city attorney, and *Carl Runge,* of counsel, for the *City of Milwaukee;* a brief by *Arthur Jones,* counsel for *The Central Bitulithic Paving Company;* and a brief in opposition by *Ryan, Ogden & Bottum,* attorneys for the appellant.

The motion was denied June 21, 1906.

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1. Both court and counsel having tried the case on the theory that the question of estoppel by former recovery was properly within the general issue raised by the pleadings, on appeal the answer is regarded as amended accordingly. *Nelson v. Campbell & Cameron Co.* 82

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4. Where the right of a matter to be determined upon appeal, with the logical basis therefor as regards legal principles, cannot be clearly discovered and satisfactorily stated without such a broad view of the matter as to include important matters of difference in other pending or known to be impending litigation, though the same were not presented by counsel, through oversight or otherwise,—that broad consideration of the case should be taken, rather than that justice in the particular case should be jeopardized or left in any uncertainty as to the grounds for the result reached. *State v. Railway Cos.* 449

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5. To overcome the rule of *stare decisis* and justify the overturning of a carefully considered decision of this court because of the discovery of a new argument not suggested when the decision was made, that argument should be of such convincing cogency as to compel belief not only that the decision was legally indefensible but that it would be palpably wrong to permit it to stand. *Hall v. Madison,* 132

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7. But if any fact essential to the verdict is supported only by testimony so in conflict with conceded and established physical facts as to be incredible for the reason that its truth is morally impossible or so improbable in the course of nature as to approximate impossibility, the setting aside such verdict is no longer discretionary with the trial court but a duty, failure of which is reviewable on appeal. *Ibid.*

8. Where the trial court has refused to set aside a verdict as contrary to the evidence, that decision will not be disturbed on appeal unless the verdict is against the great weight of the evidence and all the reasonable probabilities. *Ritter v. C., M. & St. P. R. Co.* 276

9. Where there is any credible evidence to support the verdict, the ruling of the trial court sustaining it will not be disturbed on appeal. *Bazelon v. Lyon,* 337

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11. Upon affirmance of a judgment of the circuit court which affirmed a decision of the county court admitting a will to probate, the respondent is awarded costs, it being held that the guardian *ad litem* of appellants should have been convinced by the concurring decisions of the lower courts that there was no such doubtful question or probability of a different result in this court as to make it his duty to appeal. *Will of Arneson,* 112

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Extending time of payment: Consideration: Payment of interest before due.

2. Payment of the interest before due is a sufficient consideration for an agreement to extend the time for payment of a note; but voluntary consent of the holder to an extension, given at the time of such prepayment of interest but not based upon it as a consideration, does not constitute a binding agreement to extend. *Welch v. Kukuk*, 419

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1. Where two municipal corporations are jointly charged with the maintenance of a bridge, and one unreasonably neglects or refuses to perform in that regard, the other may carry the entire burden for the time being and subsequently recover of the former, on implied promise, its just share of the expense. *Bloomer v. Bloomer*, 297

2. In case of the existence of a liability such as is indicated in the foregoing rule, the proper remedy is an action at law, not *mandamus*. *Ibid.*

3. In case of two municipalities being jointly liable for the maintenance of a bridge and one unreasonably neglecting or refusing to participate in the necessary work in that regard, that one will be precluded thereby from escaping liability for its *pro rata* share of the expense upon the ground of its not being notified of the precise act giving rise to such expense, and given opportu-

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nity to participate in determining upon and doing that particular thing. *Ibid.*

4. The legislature acting reasonably may impose upon a municipality or collection of municipalities the duty, in part, of maintaining a bridge not located within its or their boundaries. *Ibid.*

5. A bridge across a navigable river, on a town road, so intersected by a village plat as to include such bridge within the corporate limits of the village, may be properly made, by law, in part a town bridge. *Ibid.*

6. The maintenance of a bridge across a large stream requiring a larger expenditure than could be justly imposed upon a municipality in which it is located, is not a purely local affair of the town or village in which it is located. To require other municipalities to assist in maintaining it does not violate the principles of local self-government. *Ibid.*

7. The maintenance of a bridge in one municipality in part at the expense of another under the supervision of the executive officers of the two and in pursuance of a duty imposed by law does not violate the constitutional inhibition as regards the state engaging in works of internal improvement. *Ibid.*

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2. An agreement by plaintiff to pay defendant a certain sum for furnishing a buyer for a certain farm was not revoked, after plaintiff had furnished the name of a probable buyer, by defendant's informing plaintiff that he would pay no commission unless the farm should sell for a certain price,—plaintiff not having assented to such modification of the agreement. *Ibid.*

3. The fact that, after plaintiff had furnished the name of a probable buyer, negotiations for the sale were protracted and delayed for some four months before it was consummated, did not show an abandonment of the agreement to pay a commission. *Ibid.*

4. Although the formal conveyance was to a third person, yet the evidence is *held* to show that the sale of a farm, negotiated by defendant, was to the person whose name, as a probable buyer, was furnished by plaintiff. *Ibid.*

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Privilege taxes involve contract obligations. See TAXATION, 10–16.

Consideration. See BILLS AND NOTES, 2.

Validity: Public policy. See MUNICIPAL CORPORATIONS, 23–25.

Same: Restraint of trade.

2. A contract in restraint of trade will not be held invalid if the restraint imposed is reasonable with reference to the situation, business, and objects of the parties and is not specially injurious to the public. *Cottington v. Swan,* 321

3. A contract by the vendor of a livery business in a village, with its good will and equipment, not to engage in that business directly or indirectly in that village while the purchasers or their heirs, executors, or administrators should be engaged in such business in the village, is *held* reasonable and valid. *Ibid.*

Same: Foreign corporations. See CORPORATIONS.

Contracts for benefit of third persons: Revocation.

[4. Whether the doctrine that a promise by one, upon good consideration from another, to pay money to a third is irrevocable and impossible of change by the original parties, is applicable to contracts wholly executory upon both sides, not determined.] *Connor v. Marshfield,* 280

Contracts induced by fraud, etc.: Rescission. See ACTION. EQUITY, 3, 7. EXECUTORS. FRAUD. SALES, 1–3. VENDOR AND PURCHASER.

Abandonment or revocation. See BROKERS, 2, 3. CONTRACTS, 4.

Construction of particular contracts. See BROKERS, 5. INSURANCE, 4–14. MUNICIPAL CORPORATIONS, 6, 20–25.

5. The term "rated capacity" of a boiler, as used in a contract relating to a heating plant, is *held,* upon the evidence, not to refer

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to the efficiency of the boiler to warm the building satisfactorily, but to refer merely to the theoretical capacity of the boiler according to the customary way of rating such articles by dealers to the trade. *U. S. Heater Co. v. Jenss,* 162

Impairing obligation of contracts. See CONSTITUTIONAL LAW.

Compelling performance. See BRIDGES, 2. MANDAMUS.

Restraining performance. See INJUNCTION.

Cancellation: Remedy at law. See EQUITY.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 3, 4. MUNICIPAL CORPORATIONS, 16. RAILROADS, 7–12.

CONVERSION. See ACTION.

CONVEYANCES. See BROKERS, 4. EQUITY, 8. MORTGAGES. MUNICIPAL CORPORATIONS, 25.

COPIES. See EVIDENCE, 4, 5.

CORPORATIONS.

Amendment of charters. See CONSTITUTIONAL LAW. TAXATION, 12, 13.

Contracts: Conveyance by public service corporation: Public policy. See MUNICIPAL CORPORATIONS, 25.

Same: Compelling performance. See MANDAMUS.

Taxation: License fees. See TAXATION, 12–16.

Same: Situs of property. See TAXATION, 32–38.

Same: Valuation of property. See TAXATION, 43–46.

Foreign corporations: Validity of contracts.

Sec. 1770*b*, Stats. 1898, providing that contracts of a foreign corporation which has not complied with the requirements of that section "shall be wholly void on its behalf," is to be enforced according to its words. So *held* as to a contract made two days before compliance with the statute. *Allen v. Milwaukee,* 678

COSTS. See APPEAL, 11.

COUNTY COURTS: Construction of wills. See WILLS, 20.

COURT AND JURY. See TRIAL, 2–6.

COURTS.

Supreme court. See APPEAL AND ERROR. CRIMINAL LAW, 15.
Circuit courts. See APPEAL, 12. TAXATION, 56. WILLS, 19, 20.
County courts. See WILLS, 20.
Justices' courts. See JUSTICES' COURTS.
Interference with legislative action. See MUNICIPAL CORPORATIONS, 24. TAXATION, 37.

CREDITORS' REMEDIES. See BILLS AND NOTES, 1. FRAUD. SALES.

CRIMINAL LAW AND PRACTICE.

Murder and manslaughter: Degrees: Evidence: Instructions to jury. See HOMICIDE.

Attempt to commit a felony: Bribery: Overt acts.

1. The unsuccessful soliciting by a public officer of a bribe to influence his official action is an offense under ch. 34, Laws of 1901, providing that "any person who shall advise the commission of

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or attempt to commit any felony . . . that shall fail in being committed," shall be punished, etc. *Rudolph v. State,* 222

2. Where, just before a committee of a city council was to pass upon a claim, a member of such committee asked the claimant for a certain sum of money as a condition of voting for allowance of the claim, and urged the claimant to pay said sum and an additional sum to other committee members, and offered to secure favorable action on the claim if such demands were granted, these were overt acts done in furtherance of a criminal design, sufficient to justify conviction of an attempt to commit a felony. *Ibid.*

Immunity as to matters testified to before grand jury: Bribery.

3. Under sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901 (providing that in certain proceedings no person shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, etc., but that no person shall be prosecuted "for or on account of any transaction, matter, or thing concerning which he may testify"), the immunity from prosecution is not broader than the constitutional privilege of the witness (Const., art. I, sec. 8) as to self-crimination. *State v. Murphy,* 201

4. One who was subpœnaed, sworn, and examined before the grand jury, answering only the questions asked, but making no objection to them, is entitled to such immunity as the statute confers, as to transactions concerning which he so testified.

WINSLOW, J., dissents, being of the opinion that, in order to gain the immunity, the witness must be *compelled* to testify, and that compelling a person to appear by subpœna cannot properly be considered as compelling him to testify.

MARSHALL and KERWIN, JJ., are of the opinion that the immunity is given only where the witness testifies under real compulsion, not mere right of compulsion; that is, there must be coercion to the extent of the witness being called to testify under such circumstances that he would be liable to punishment as standing in defiance of the court if he refused to do so. *Ibid.*

5. It is not necessary, in order that there may be immunity from prosecution, that the witness should have given evidence adverse to himself, or that he should have told the truth. *Ibid.*

6. An alderman, giving evidence before the grand jury, answered in the negative the question whether he had received any money for his vote on special privileges, bay windows, sidetracks, etc. *Held,* that he did not thereby testify concerning the transaction, matter, or thing for or on account of which he was afterwards prosecuted upon an information charging that he had solicited and received a certain sum to induce him to vote in favor of an ordinance allowing certain persons to lay a sidetrack across certain streets. *Ibid.*

7. Testimony of an alderman before the grand jury that he knew of no bribery or crookedness in public affairs, does not entitle him (under sec. 4098, Stats. 1898, as amended by ch. 85, Laws of 1901) to immunity from prosecution for soliciting a bribe while such alderman. *Rudolph v. State,* 222

8. Testimony of an alderman before the grand jury that at a certain time he was such alderman was not testimony of a criminating fact coming within the constitutional privilege as to self-crimi-

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nation, and does not entitle the witness to immunity from prosecution for soliciting a bribe to influence his official action while such alderman. *Ibid.*

Change of venue: Prejudice of people.

9. The denial of a motion for change of venue on account of prejudice of the people of the county is *held* not to have been error, the affidavits as to the fact of prejudice being conflicting. *Montgomery v. State,* 183

Former jeopardy.

10. Where defendant had been arrested on a charge of assault and had pleaded not guilty, but after adjournment and before the trial commenced the case had been *nolled* and defendant discharged, this did not constitute a former jeopardy barring a subsequent prosecution for murder arising out of the same transaction. *Ibid.*

Preliminary examination: Sufficiency.

11. Defendant was arrested on complaint and warrant charging murder; he pleaded not guilty, and an adjournment was had; on the adjourned day an examination was held and an inquest taken; the justice found there was probable cause to believe defendant guilty of murder and ordered the proceedings to be stopped, and committed defendant to jail to answer for the offense. *Held,* that there was a sufficient preliminary examination. *Ibid.*

Separate trial of issue as to immunity.

12. Where defendant requested a separate trial of the issue on the plea of immunity, and the information fully set out the matter on account of which he was attempted to be prosecuted, such separate trial was not error. *State v. Murphy,* 201

Trial: Instructions to jury. See HOMICIDE, 3.

13. A requested instruction should be so drawn that it can be given without change. *Montgomery v. State,* 183

14. In prosecutions for serious crimes a requested instruction should not be refused on account of a mere verbal inaccuracy, but the trial court should correct the inaccuracy and give the instruction. *Ibid.*

Reporting case to supreme court: Form of questions.

15. The question whether a special plea of immunity should be tried separately or in conjunction with the plea of not guilty was not a proper one, in that abstract form, to be certified to the supreme court under sec. 4721, Stats. 1898, but is treated as being in effect a question whether error was committed in the particular case by such separate trial. *State v. Murphy,* 201

DAMAGES. See FRAUD, 2.

DEBTOR AND CREDITOR. See BILLS AND NOTES. FRAUD. SALES. TOWNS.

DECEIT. See FRAUD. SALES, 1.

DEEDS. See BROKERS, 4. EQUITY, 8. MORTGAGES. MUNICIPAL CORPORATIONS, 25.

DEFAULT in payment of license fee: Penalty. See TAXATION, 63–68.

DEFINITIONS. See WORDS AND PHRASES.

DELEGATION OF POWER. See TAXATION, 39, 40, 54, 56.

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DIPLOMAS. See MANDAMUS.

DISCONTINUANCE of action. See DIVORCE, 1.

DISCRETION. See APPEAL, 7. MUNICIPAL CORPORATIONS, 24. TAXATION, 53. WILLS, 7-10.

DIVORCE.

1. Upon a motion by the plaintiff husband for discontinuance of a divorce action the court was not bound to discontinue it unconditionally, but might, as a condition, require plaintiff to pay the reasonable attorney's fees and other expenses incurred by the wife in defense of the action, and also an unpaid balance of temporary alimony theretofore due to the wife under a previous order of the court. *Schulz v. Schulz,* 28
2. The attorney's fees which the husband should be required to pay for his wife in a divorce action are such only as will reasonably compensate the services performed in carrying on the litigation, in view of all the circumstances of the case, regardless of the number of attorneys employed; and in a case where numerous attorneys were unnecessarily employed and discharged by the wife without reason or excuse, an allowance of $474.50 is *held* excessive and is reduced to $250. *Ibid.*
3. The report of a referee as to the value of attorneys' services for the wife in an action for divorce was merely advisory, and, though there was no exception to such report, the court had full power to modify it and determine for itself the amount to be allowed. *Ibid.*

DOCKET ENTRIES. See JUSTICES' COURTS, 1-4.

DRAINS.

Qualifications of commissioners: Interest. See OFFICERS.

The word "competent" in sec. 1379—13, Stats. 1898 (providing for the appointment of three competent persons as drainage commissioners), refers to skill, intelligence, and business ability, and does not mean disinterested, so as to disqualify for such appointment persons owning land in the proposed drainage district. *In re Cranberry Creek Drainage Dist.* 98

EASEMENTS.

Evidence *held* not to sustain a finding of the trial court that defendant had a prescriptive right to a private way across plaintiff's land. *Kolpack v. Kolpack,* 169

ELECTION.

Between remedies. See FRAUD, 1, 2.

By widow, as to provision in will. See WILLS, 24.

ELECTIONS.

1. The question whether women might (under ch. 211, Laws of 1885) vote at an election not involving the selection of officers but involving merely the decision of a question pertaining to school matters, was not decided in *Brown v. Phillips,* 71 Wis. 239, or *Gilkey v. McKinley,* 75 Wis. 543. *Hall v. Madison,* 132

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2. An "election," within the meaning of the statutes of this state, includes a referendum vote to decide a question of policy, as well as an ordinary election to choose between candidates for public office. *Ibid.*

3. An election to determine whether a city shall issue bonds for the purpose of building a school house is an "election pertaining to school matters," within the meaning of ch. 211, Laws of 1885. *Ibid.*

4. The word "electors" in sec. 943 (providing for submission to the electors of the question of issuing bonds) means the electors qualified by law to vote on any given proposition and therefore, in respect to an election pertaining to school matters, includes women, they being fully qualified constitutional electors at such an election. *Ibid.*

5. Ch. 288, Laws of 1893 (subd. 6, sec. 12, Stats. 1898), not having been submitted to the people, could not add to or subtract from the right of suffrage upon school matters given to women by ch. 211, Laws of 1885. All that the legislature could do, without such submission, was to provide the machinery for executing the law of 1885, as was done by ch. 285, Laws of 1901. *Ibid.*

6. Contiguous portions of a town having by statutes been attached to a city for school purposes in order, merely, that the inhabitants of such territory might send their children to the city schools upon payment of their share of the expense of operating such schools, such inhabitants have no right to vote upon the question of bonding the city to build a school house. *Ibid.*

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 10.

EQUALIZATION OF ASSESSMENTS. See TAXATION, 52–57.

EQUITY.

See DIVORCE. INJUNCTION. MUNICIPAL CORPORATIONS, 24. PARTIES. VENDOR AND PURCHASER. WILLS, 19, 20.

Adequacy of legal remedy: Cancellation of note: Fraud.

1. One who has a complete defense at law to any action which may be brought against him upon a written instrument cannot maintain an action in equity for cancellation of such instrument unless there are special circumstances making such defensive legal remedy inadequate to promote the ends of justice and afford complete relief. *Johnson v. Swanke,* 68

2. The jurisdiction of equity is restricted in such cases in deference to the constitutional guaranty of the right of trial by jury, and such guaranty, liberally construed, determines the extent of the restriction. *Ibid.*

3. The fact that the execution of the written instrument was induced by fraud is not, of itself, such a circumstance as would entitle the defrauded party to maintain the action for cancellation, since, where the legal remedy is adequate, a party is entitled to a jury trial in a case founded on fraud, the same as in any other. *Ibid.*

4. Whether special circumstances exist in any particular case, rendering the legal remedy inadequate, so that the case is a proper one to be dealt with by equity jurisdiction, is, in the absence

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of precedents furnishing a certain guide, a matter of judgment; and the decision of the trial court thereon should not be reversed unless clearly wrong. *Ibid.*

5. Mere necessity to await the pleasure of the holder of a void instrument to commence action thereon, though it may raise a presumption of annoyance or inconvenience to the party having a legal defense, does not raise a presumption of irreparable injury, and, in the absence of anything to show that the instrument has been or will be used as a basis for vexatious litigation, does not warrant an action for cancellation. *Ibid.*

6. Although there are a number of makers of a note which is alleged to be void, each of whom may be sued separately thereon, this fact does not warrant an action for cancellation on the ground that it will prevent a multiplicity of actions. *Ibid.*

7. The fact that a note was given for the purchase price of a horse which the makers were induced by fraud to buy and which is useless and a continuing cause of expense to them, does not warrant an action for cancellation of the note in order that the matter may be speedily adjudicated. Having duly rescinded the contract they may, upon proper notice, sell the horse and reimburse themselves for their expenses, holding any balance for the parties entitled thereto. *Ibid.*

Same: Money had and received: Accounting.

8. Where the grantee in a deed absolute in form but in legal effect a mortgage wrongfully conveyed the land to a third person for a sum greater than the mortgage debt, the mortgagor, acquiescing in such sale, may recover the excess from the mortgagee in an action for money had and received. No accounting is necessary and, the remedy at law being adequate and complete, an equitable action will not lie. *Barchent v. Snyder*, 423

Remedy as to mistakes in assessment. See TAXATION, 47.

ESTATES in land. See WILLS, 11, 15–18.

ESTOPPEL. See EXECUTORS, 2. INSURANCE, 14. TOWNS.

EVIDENCE.

Presumptions. See HOMICIDE, 3.

Burden of proof. See TAXATION, 52.

1. Where there are two reasonably probable theories to account for an injury, the burden is upon the plaintiff to prove by some credible evidence that one which establishes defendant's liability. *Peat v. C., M. & St. P. R. Co.* 86

2. In an action upon a contract by which defendant guaranteed payment for a heating plant sold by plaintiff to a third person, it being stated in the contract that plaintiff was not to be held responsible in connection with the installation except as to the rated capacity of the boiler, the burden was upon the defendant to show that the boiler did not have the rated capacity agreed upon. *U. S. Heater Co. v. Jenss*, 162

3. In an action to recover the amount paid for goods which had been returned to the defendants, it being undisputed that the amount was due to plaintiff unless she had received credit therefor, it was not error to refuse to instruct the jury that the burden was upon plaintiff to show by a preponderance of the testimony and

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with reasonable certainty that defendants were indebted to her. *Bazelon v. Lyon,* 337

Relevancy, materiality, and competency. See LOGS AND TIMBER, 2, 3. RAILROADS, 11. SALES, 4, 5.

Best and secondary evidence: Copies.

4. Original letters and letter-press copies thereof are not regarded as duplicates, and such copies are not admissible in evidence where it is not shown that the originals are not in existence or cannot be produced, even though it appears that they were written to a third person and are not in the possession or under the immediate control of the party offering the copies. *Menasha W. W. Co. v. Harmon,* 177

5. Evidence that a letter could not be produced but had been burned or destroyed was sufficient to warrant the admission of secondary evidence of its contents. *Bazelon v. Lyon,* 337

Documentary evidence: Official scale bill. See LOGS AND TIMBER, 2.

Same: Books of account.

6. To render book entries admissible in evidence under sec. 4189, Stats. 1898, the preliminary proof required by that section must be made. *Bazelon v. Lyon,* 337

Opinion evidence: Experts.

7. Ordinarily a farmer is competent to give opinion evidence as to the value of such horses as he owns. *Palmer v. Goldberg,* 103

8. The question being whether defendant had agreed to pay plaintiff a commission for procuring a purchaser for certain land, it was error to permit the purchaser, as a witness, to give his mental conclusion as to plaintiff's relation to the sale. *Zitske v. Grohn,* 159

9. The question as to the proper theoretical rating of a boiler is one within the field of expert inquiry. *U. S. Heater Co. v. Jenss,* 162

Weight and sufficiency: Positive and negative testimony. See RAILROADS, 5, 6, 10. WILLS, 3, 4.

Evidence of party, how far conclusive against him. See HOMICIDE, 1. TRIAL, 8.

Order of proof: Rebuttal. See TRIAL, 1.

EXAMINATION of offenders. See CRIMINAL LAW, 11.

EXCEPTIONS AND BILL OF EXCEPTIONS. See APPEAL, 2, 3.

EXCHANGE OF PROPERTY. See BILLS AND NOTES, 1.

EXECUTION of will. See WILLS, 3, 4.

EXECUTORS AND ADMINISTRATORS.

See WILLS.

Sale of land by administrator: False representations.

1. Findings of the trial court to the effect that a diagram made by an administrator and used by him at a public sale of lots falsely represented that a street upon which said lots abutted was sixty feet wide, when in fact it was but twenty-four feet wide, are *held* to be sustained by the evidence. *Greiling v. Watermolen,* 440

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2. At the time of a sale of lots by an administrator it was understood that the purchase moneys were to be used in discharging mortgage and tax liens on said lots and upon other land, and that the purchasers were to have title free from all incumbrances. Without waiting for confirmation of the sale the administrator so applied said moneys. *Held*, that a purchaser who thereafter discovered that the administrator had made false representations as to the width of the street on which the lots fronted was not estopped, by reason of the administrator having paid out the purchase money with his knowledge and consent, from rescinding the sale. *Ibid.*

3. One who, having been induced by false representations to purchase land from an administrator, has demanded rescission of the sale and opposed confirmation thereof, is a person aggrieved by an order of the county court confirming the sale, and may appeal from such order. *Ibid.*

EXEMPTIONS from taxation. See TAXATION, 20–22, 49–51.

EXPERT TESTIMONY. See EVIDENCE, 7–9. TRIAL, 2.

EXTENSION of time for payment. See BILLS AND NOTES, 2.

FALSE REPRESENTATIONS. See EXECUTORS. FRAUD. SALES, 1. VENDOR AND PURCHASER.

FEES of attorneys. See DIVORCE.

FELLOW-SERVANTS. See MASTER AND SERVANT, 2. RAILROADS, 12.

FINDINGS OF FACT. See SALES, 3. WILLS, 1, 5.

FIRE INSURANCE. See INSURANCE, 1–10.

FOREIGN CORPORATIONS. See CORPORATIONS. TAXATION, 16.

FORFEITURES.

See INSURANCE, 4, 5. TAXATION, 63–68.

In an action to recover a forfeiture under sec. 1819, Stats. 1898, the person prosecuting and alleged to be entitled to one half the forfeiture may join with the state as party plaintiff, under sec. 3297. *State v. Wis. Cent. R. Co.* 79

FORMER ADJUDICATION. See JUDGMENT, 2, 3.

FORMER JEOPARDY. See CRIMINAL LAW, 10.

FRANCHISES. See TAXATION, 43–46.

FRAUD.

See ACTION. EQUITY, 3, 7. SALES, 1–3. VENDOR AND PURCHASER.

1. Where plaintiff was induced by fraud to accept a worthless note in payment for horses, his action upon such note, prosecuted to judgment and execution, was not the election of a remedy inconsistent with or barring a subsequent action against the wrongdoers for damages on account of the fraud. *Palmer v. Goldberg*, 103

2. A prayer for relief, in the later action, asking judgment for the value of the horses does not show an inconsistency with the former action, since, the note being worthless, the value of the horses is the measure of the loss caused by the fraud. *Ibid.*

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3. Findings by the jury, to the effect that defendants combined to defraud plaintiff and that representations by which he was induced to part with his property were made pursuant to such combination and were false, are *held* to be sustained by the evidence. *Ibid.*

4. One who makes false representations of fact to induce another to enter into a contract whereby injury to the latter may result because of such falsity, is liable for the damages caused by his conduct, regardless of whether he knew, or in the exercise of ordinary care might have known, the truth of the matter. *Ibid.*

FRIGHTENING HORSES. See AUTOMOBILES.

GENERAL APPEARANCE. See JUSTICES' COURTS, 2.

GRAND JURY: Immunity to persons testifying. See CRIMINAL LAW, 3–8.

GUARANTY. See EVIDENCE, 2.

GUARDIANS AD LITEM. See APPEAL, 11. WILLS, 21–23.

HIGHWAYS. See BRIDGES. JUDGMENT, 3.

HOMICIDE.

Degrees: Heat of passion: Defendant's testimony not conclusive against himself.

1. The fact that defendant testified positively that he was not angry at the time when he is charged with having killed another person did not so conclude him that he was not entitled to have submitted to the jury the question whether the killing was done in the heat of passion so as to make the offense manslaughter in the second or fourth degree. *Perugi v. State*, 104 Wis. 230, on this point, overruled. *Montgomery v. State*, 183

Premeditated murder: Insufficient evidence.

2. Upon the evidence in this case—showing, among other things, that if defendant killed his wife, whose death was caused by dislocation of the vertebræ of the neck, he did so either by a blow upon the neck or by causing her to fall from the buggy in which they were riding in the daytime past the homes of friends and neighbors,—it is *held* that a verdict of premeditated murder was not warranted. *Ibid.*

Same: Husband and wife: Presumption: Instructions to jury.

3. Upon the trial of one charged with murder of his wife the court properly refused to give an instruction to the effect that there was a powerful presumption, resulting from the marital relation, that the deceased was not killed by her husband or that there was not malice aforethought. *Ibid.*

HUSBAND AND WIFE. See DIVORCE. HOMICIDE, 3.

IMMUNITY from prosecution. See CRIMINAL LAW, 3–8, 12, 15.

IMPLIED CONTRACTS. See BRIDGES, 1–3. TAXATION, 10–16.

IMPROVEMENTS. See INJUNCTION. MUNICIPAL CORPORATIONS, 3–6.

INFANTS: Allowances to guardians *ad litem*. See WILLS, 21–23.

INJUNCTION.

1. Where a contract for the improvement of a street was void and the invalidity was of a character likely to prejudice the owners

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of abutting lots in a manner and degree not readily separable from the burdens which might lawfully be imposed upon them, such a lotowner, who commenced his action promptly and before any work had been done, was entitled to a temporary injunction restraining payments on the contract or issuance of assessment certificates. *Allen v. Milwaukee,* 678

2. A taxpayer has the right to restrain the payment by city officers of money which the city does not owe. *Ibid.*

INSOLVENCY. See BILLS AND NOTES, 1. SALES, 2, 3.

INSTRUCTIONS TO JURY. See APPEAL, 2. CONTRACTS, 1. CRIMINAL LAW, 13, 14. EVIDENCE, 3. LOGS AND TIMBER, 2. SALES, 6. TRIAL, 3–6.

INSURANCE.

FIRE.

Oral contract: What constitutes: Validity.

1. A written application to an insurance company for a policy of fire insurance, and a promise by the agent of the company to attend to the matter for the applicants, do not constitute a valid contract of insurance *in præsenti. Whitman v. Milwaukee F. Ins. Co.* 124

2. It is essential to a valid contract of insurance that the time of the commencement of the risk be agreed upon. *Ibid.*

3. A valid contract of insurance against fire may be made orally. *Ibid.*

Forfeiture: Waiver: Rights of mortgagee.

4. Under the provision of the standard fire insurance policy that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void if foreclosure proceedings be commenced with the knowledge of the insured, a forfeiture for that reason was not waived by mere silence of the insured after knowledge of the facts, nor by its retention of proofs of loss which it did not invite, nor by its failure to tender back the unearned premium, even though the insured was thereby induced to believe that the policy would be continued in force notwithstanding such foreclosure proceedings. *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, and other cases in which the insured was put to trouble and expense at the request of the insurer, after the latter had knowledge of the forfeiture, distinguished. *Woodard v. German-American Ins. Co.* 1

5. A mortgagee as to whom a fire insurance policy provides merely that the loss, if any, shall be payable to him as his interest may appear, has no greater rights, after a forfeiture, than has the insured. *Ibid.*

Goods in custody of carrier: "Owners as interest may appear:" Notice and proofs of loss.

6. Where goods shipped to plaintiff were allowed, in accordance with an arrangement of long standing between him and the carrier, to remain in the latter's warehouse until plaintiff should by written order direct delivery to his customers, such goods were in the custody of the carrier "as warehouseman, forwarder, carrier, or otherwise," within the meaning of a fire insurance policy issued to the carrier. *Kellner v. Fire Asso.* 233

7. A policy issued to a carrier and insuring it "and other owners as interest may appear" against loss by fire "on merchandise and

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property of every description, loaded or not loaded in cars, including freight, back charges, charges, advances, liens, and claims thereon, their own or in their custody as warehousemen, forwarders, carriers, or otherwise, contained in" a certain warehouse, covers the property designated and not merely the carrier's interest or liability in respect to it. *Ibid.*

8. A stipulation in such a policy provided that the carrier, although it may or may not be liable for any loss, shall, after a loss, give notice to said assurer who was insured thereby, and that said notice shall be conclusive upon the assurer as to who, in addition to said carrier, was so insured. *Held*, that this gave the carrier no right to cut off, by electing not to include, certain owners of property covered by the policy. *Ibid.*

9. Under such a policy an owner of property covered thereby had a right, when a loss occurred, to adopt the acts of his agent, the carrier, and thereby to secure the benefit resulting from the policy, the same as if it had originally been issued to such owner. *Ibid.*

10. The insurance company was notified of a fire by the assured soon after its occurrence, and the assured submitted an itemized statement of the different articles destroyed, in the form of two schedules, one containing those articles which the assured claimed were covered by the policy, and the other containing the articles (including plaintiff's goods) which may have been covered. *Held*, that this was sufficient notice and proof of loss to entitle plaintiff to enforce his claim against the insurer. *Ibid.*

LIFE.

Lapse for nonpayment of premium: Revival: Rights of assured.

11. A life insurance policy provided that, in case of lapse for nonpayment of a premium, it would be revived at any time within two years upon written application and payment of arrears, provided evidence of the insurability of the assured, satisfactory to the company, were furnished. *Held*, that an assured applying for such a revival did not stand in the same position as an applicant for a policy in the first instance, but had a contract right to the revival upon the specified conditions. *Leonard v. Prudential Ins. Co.* 348

12. The company in such a case was bound to act reasonably and with fairness to the assured. It had no right of arbitrary refusal, or right to act upon information secretly obtained without opportunity for the assured to meet it. *Ibid.*

13. The company was bound, also, to act with reasonable promptness in passing upon an application for revival, and if the result was unfavorable to notify the assured. *Ibid.*

14. A policy containing such provision for revival after default did not, nor did any custom, require the issuance of a revival receipt. After the assured, applying for a revival, had submitted to a medical examination to show his insurability, the company's examiner negligently failed for thirty days to send in his report, and the company thereafter failed for six weeks to pass upon the application, making in the meantime a secret inquiry as to the habits of the assured, and then, after denying the application, failed to give notice of such action to the assured or any one representing him until some days after his death, which oc-

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curred about seventeen days after such denial. *Held*, that the company was estopped to assert that the policy had not been revived. *Ibid.*

INTEREST.
Addition to verdict. See TRIAL, 7.
Payment before due as consideration for extension. See BILLS AND NOTES, 2.

JEOPARDY. See CRIMINAL LAW, 10.

JUDGES: Imposing nonjudicial power upon. See TAXATION, 56.

JUDGMENT.

Notwithstanding special verdict: Setting aside or changing findings.

1. Where the findings of a special verdict in connection with the undisputed evidence would not sustain a judgment for plaintiff, it is immaterial, upon rendering judgment for defendant notwithstanding the verdict, whether or not the verdict be set aside or the answers therein changed. *Woodard v. German-American Ins. Co.* 1

On contract different from that alleged. See JUSTICES' COURTS, 5.

Contrary to stipulation limiting claim. See STIPULATIONS.

Directed by appellate court: Power of trial court. See APPEAL, 10, 12.

Validity: Essential docket entries. See JUSTICES' COURTS, 1–4.

Former recovery as a bar. See APPEAL, 1.

2. In a former action against one C., plaintiffs demanded damages for the cutting and removal of all the timber from certain land, and it was undisputed that all the timber had been removed by a corporation to which C., claiming to be the owner of the land, had sold the timber. The case was submitted to the jury on the theory that, if plaintiffs were entitled to recover, they were entitled to recover for all the timber shown to have been taken from the land. The jury found for plaintiffs, assessing the damages, and plaintiffs had judgment therefor, which was paid. *Held*, that plaintiffs cannot now recover damages from said corporation for timber removed by it before the date of the alleged sale, since full damages for the removal of all the timber were included in the former recovery. *Nelson v. Campbell & Cameron Co.* 82

Res judicata: Former judgment upon whom binding.

3. A., being interested in having it determined that a certain road or track over B.'s land was a public highway, procured the bringing of an action in the name of the state against B. to recover the statutory penalty for obstructing such alleged highway. The district attorney was afterwards called into the case, but did not interfere with its management and prosecution by A. and his attorney. The court found and adjudged that the road was not a public highway. *Held*, that although A. was not a party to the record in that action, the judgment therein was binding upon him in a subsequent action against him brought by B. to restrain him from passing over said road and from removing barriers placed therein. *Kolpack v. Kolpack*, 169

JUDICIAL POWER. See TAXATION, 54, 56.

JURISDICTION. See JUSTICES' COURTS, 1–4. TAXATION, 52–56. WILLS, 19, 20.

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JUSTICES' COURTS.

Docket entries essential to validity of judgment.

1. In order that a justice's docket should establish the invalidity of his judgment it must fail to establish some fact which is not only essential to jurisdiction but which the statute requires shall be entered upon the docket. *McGeehan v. Bedford,* 167
2. Failure of the docket to set forth fully the return of service is immaterial where it shows that defendant appeared generally in the case. *Ibid.*
3. A statement in the docket that plaintiff "filed written complaint showing an indebtedness of $90" satisfies the requirement of sec. 3574, Stats. 1898, that where the pleadings are written the docket shall contain "a brief statement of their nature and reference to the pleadings filed." *Ibid.*
4. There being no statute requiring entry of the fact that evidence was given to support the judgment, the omission of such entry from the docket does not of itself establish that the judgment is void. *Ibid.*

Judgment on contract different from that alleged.

5. At the close of the trial of an action on contract in justice's court the justice properly refused to permit the complaint to be amended so as to allege a different contract, evidence of which had been received against objection; but it was error for him afterwards to render judgment for plaintiff, the evidence having wholly failed to prove the contract as alleged. *Genger v. Westphal,* 426

LANDLORD AND TENANT: Estoppel to deny validity of lease. See TOWNS.

LANGUAGE not understood by testator. See WILLS, 2.

LEASES: Estoppel to deny validity. See TOWNS.

LEGISLATIVE POWER: Delegation. See TAXATION, 39, 54.

LEVY of taxes. See TAXATION, 39–42.

LICENSE to operate railroad: Application for: Fees: Revocation. See TAXATION, 27, 28.

LICENSE FEES.
Privilege taxes: Constitutionality: Railroads, etc. See TAXATION, 10–31.
Default in payment by railroad company. See TAXATION, 63–68.

LIENS.
On horse for expenses. See EQUITY, 7.
On land, under will. See WILLS, 17.

LIFE INSURANCE. See INSURANCE, 11–14.

LOCAL SELF-GOVERNMENT. See BRIDGES, 6.

LOGS AND TIMBER.

Measurement: Official scale bill: Evidence.

1. Where a lumber inspector measured about one third of a quantity of logs, averaged the result, and multiplied such average by the whole number of logs, such process did not constitute "a scalement or measurement" of the logs, within the meaning of sec.

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1735, Stats. 1898, and no official scale bill could be based thereon. *Hurst v. Webster Mfg. Co.* 342

2. A scale bill certified by the inspector, which had been received in evidence, was properly stricken out when it appeared that it was based upon an estimate made as above described; but it was error for the court afterwards to refer to it as a scale, telling the jury the quantity shown by it, and stating that it was for the jury to determine whether it was technically a scale. The facts being undisputed, it was for the court to determine whether it was technically a scale. *Ibid.*

3. The oral testimony of the inspector as to the number of feet in the logs so measured and estimated should also have been stricken out, there being no evidence that those estimated would average the same as those measured, or that a correct estimate could be made in that way. *Ibid.*

Wrongful cutting: Former recovery of damages. See JUDGMENT, 2.

MANDAMUS.

See BRIDGES, 2. VENUE.

Mandamus will not lie to compel a private corporation to perform its obligations resting solely on contract with an individual. So *held* as to the contract of a medical college to grant its diploma to one completing the course of instruction and complying with certain conditions. *State ex rel. Burg v. Milwaukee Medical College,* 7

MANSLAUGHTER. See HOMICIDE, 1.

MASTER AND SERVANT.

Duty to furnish safe place for work: Delegation: Neglect to give warning.

1. The rule that the master's duty to provide a reasonably safe place for his servants to work in cannot be delegated to another has no application to a case where the place is not inherently dangerous but is liable to be rendered unsafe, as by the sudden approach of a street car over which the master has no control. *Gereg v. Milwaukee G. L. Co.* 35

2. The foreman of laborers digging a trench in the street for a gas main is a fellow-servant with such laborers, so that the employer is not liable for an injury to one of the men caused by the foreman's neglect to inform him that street cars were liable to pass or failure to station a watchman to give warning of their approach. *Ibid.*

Assumption of risk: Reliance on promise to remove danger: Reasonable time.

3. A servant who, in reliance upon the master's promise to make repairs or remove a danger, continues in the service for a longer time than is reasonably necessary for the fulfilment of such promise, assumes the risk. *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.* 46

4. Plaintiff's intestate, whose duties required him to go frequently along a narrow passageway beside an unguarded mining shaft, the danger from which was obvious, threatened to quit work

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unless the opening of the shaft was guarded, but was induced to continue at his work by the assurance of defendant's superintendent that the place would be fixed in a short time. Thereafter, though no guard was erected, he continued at his work for seven days, when he fell down the shaft and was killed. An abundance of suitable materials was at hand and the work of guarding the shaft could have been done in half a day by an unskilled laborer. *Held*, that deceased had assumed the risk. *Ibid.*

Same: Sectionmen on railroad: Danger from trains. See RAILROADS, 7–12.

Notice of likelihood of mob violence, given to city by employer, does not inure to benefit of employee. See MUNICIPAL CORPORATIONS, 14.

MAXIMS.
De minimis non curat lex, 513.
Expressio unius est exclusio alterius, 604, 606, 634.
Noscitur a sociis, 220.
Res judicata pro veritate accipitur, 145, 147.
Stare decisis, et non quieta movere, 132, 147, 153, 539, 593.
Ut res magis valeat quam pereat, 140.

MEDICAL COLLEGES: Diplomas. See MANDAMUS.

MENTAL CAPACITY. See WILLS, 1.

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS, 4–6, 10.

MISTAKE.
In assessing property. See TAXATION, 47, 48.
In making return of gross earnings of railroad. See TAXATION, 67, 68.
Of county clerk in statement of amount required to redeem land. See TAX TITLES.

MOBS: Injuries by: Liability of city. See MUNICIPAL CORPORATIONS, 14–16.

MONEY HAD AND RECEIVED. See EQUITY, 8.

MORTGAGES.

By deed absolute in form: Evidence: Remedies. See EQUITY, 8.

The fact that a deed absolute in form is in legal effect a mortgage may be shown in an action at law. *Barchent v. Snyder*, 423

Rights of mortgagee as to fire insurance, after forfeiture. See INSURANCE, 5.

Assessment for taxation. See TAXATION, 49–51.

MULTIPLICITY OF ACTIONS. See EQUITY, 6.

MUNICIPAL CORPORATIONS.

Classification.

1. The basis of the rule that classification for the purposes of general legislation cannot be based upon existing circumstances only, is that legislation of that sort must necessarily appertain to unchangeable conditions. It has no reference to legislation so applying to present and future conditions as well that the members of the class may be increased or diminished. *Bloomer v. Bloomer*, 297

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2. The rules as to legitimate classification for general legislation are:

(a) The classification must be based on substantial distinctions making one class really different from another.

(b) The classification must be germane to the purposes of the law.

(c) The classification must not be based on existing circumstances only.

(d) The law must apply equally to members of the class.

(e) The character of the class must be so different from other situations as to reasonably suggest necessity or propriety, having regard for the public good, of substantially different legislative treatment therefor from that required for such others. *Ibid.*

Joint maintenance of bridges: Local self-government. See BRIDGES.

Street improvements: Special assessments: Use of patented process: Competitive bidding.

3. Under a city charter giving power to impose, by special assessment, upon abutting lots the cost of a street improvement only upon competitive bids, the city has no power to adopt a patented pavement so controlled by a monopoly that there can be no competition, in the fair and reasonable meaning of the word. *Allen v. Milwaukee,* 678

4. Sec. 23, ch. V, of the Milwaukee city charter (giving the board of public works power, under the authority of the common council, to make contracts for the use of any patent or patented article or process at a stipulated sum or royalty, and thereupon to order any work, whether chargeable to the city or to lots, to be done with such patented article or process) requires the approval of the council for the acquirement of the right to use patented articles or processes, and that the subject shall have been so submitted for consideration by the council that there can be no reasonable doubt that the council has consciously and intentionally given the authority. *Ibid.*

5. Said charter provision does not dispense with competitive bidding as an essential of the scheme for paving streets at the expense of abutting lots. It contemplates the acquisition of a right to operate under the patent for a royalty and then the letting of the actual work to the lowest bidder. *Ibid.*

6. The patentee of a certain pavement filed with the board of public works of Milwaukee a proposal to the effect that any one contracting with the city to improve streets with said patented pavement should have the right to lay the same upon paying the patentee a certain sum per square yard, for which sum the patentee was not only to grant the right to use the patents, but was to prepare and furnish a large part of the material for the pavement, as well as an expert adviser. The common council directed the improvement of a street with such a pavement, and the assessment of a part of the cost upon abutting lots. A contract was let accordingly, the contractor being required to hold the city harmless against all claims or fees for any patented article used on the work. The sum to be paid the patentee under its proposal was about two thirds of the contract price for the pavement. *Held,* that no contract such as is authorized by sec. 23, ch. V, of the charter had been made with the patentee, and hence that there was no power to contract for work involving the use of the patent. *Ibid.*

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Same: Void contract: Restraining payments, etc. See INJUNCTION.

Vacation of streets and alleys: Milwaukee charter.

7. The owner of a lot bounded by a public street or alley within a recorded city or village plat takes title to the center of such street or alley, subject to the public easement. *Johnston v. Lonstorf,* 17

8. The mere fact that a portion of an alley is a *cul-de-sac* does not preclude it from being a public alley. *Ibid.*

9. Where a public street or alley has been legally established it can be vacated only by compliance with statutory requirements; and where a city charter gives the council power to vacate, but does not prescribe how that power shall be exercised, the provisions of secs. 904, 927, Stats. 1898, are to be followed. *Ibid.*

10. The Milwaukee city charter (authorizing the common council to vacate streets and alleys upon petition of a specified number of freeholders and residents of the ward and upon the necessity therefor being established by the verdict of a jury, but not expressly requiring the consent of, or compensation to, abutting owners) does not give the common council power to vacate a public alley without compensation to the protesting owners of lots abutting thereon. *Ibid.*

Regulating speed of automobiles: Ordinances.

11. A municipal ordinance limiting the speed of automobiles within a radius of half a mile from a certain bridge is not invalid because it fails to provide for establishing or marking in any way the limits of such district so that a driver will know when he reaches it. *Eichman v. Buchheit,* 385

12. In an ordinance regulating the use of automobiles upon the streets of a city and limiting the speed to six miles per hour between crossings and four miles an hour at crossings, the word "crossings" plainly refers to street crossings. *Ibid.*

13. The speed permitted by such ordinance is not unreasonably low. *Ibid.*

Injuries by mob: Liability: Notice: Contributory negligence.

14. Under secs. 938, 939, Stats. 1898 (giving a right of action against a city for injuries inflicted by a mob, provided the person injured shall have immediately notified the mayor of the city after being apprised of any threat or attempt to injure him by any mob), the notice must be given by or on behalf of the person claiming damages; and a notice given by an employer, not on behalf of its employees, of the likelihood of mob violence on account of a strike, does not inure to the benefit of the employees. *Long v. Neenah,* 40

15. The evidence in this case, although it shows that plaintiff and others had been jeered at on the street and called "scabs" by crowds, who also said "we will knock your block off," etc., is *held* not to show that he had been apprised of any threat or attempt to injure him by the mob which met and assaulted him on his return to defendant city in the nighttime after an absence of two or three days. *Ibid.*

16. Evidence showing, among other things, that plaintiff, a nonunion man, left his place of employment in the nighttime and went to and from the railroad station unaided and unguarded, is *held* not to show that injuries inflicted upon him by a mob were caused by his negligence. *Ibid.*

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Equalization of assessments as between municipalities. See TAXATION, 52–57.

Bonds: Issuance for school buildings: Repeal of statutes.

17. Sec. 926—11, Stats. 1898, giving to all cities operating under special charters the power to issue bonds for the erection of school buildings, operated to repeal ch. 295, P. & L. Laws of 1861, so far as that act limited the power of the city of Madison to borrow money and issue bonds for a high school. *Hall v. Madison,* 132

Same: Elections "pertaining to school matters:" Right of women to vote. See ELECTIONS.

Same: Purchase of equity of redemption in waterworks: Statutes construed: Municipal indebtedness.

18. Sec. 959—51, Stats. 1898 (sec. 4, ch. 361, Laws of 1897), confers upon a city or village a new and specific authority in a particular case, independent of the power granted in sec. 927—1, *i. e.* the authority to acquire an equity of redemption in a system of waterworks or lighting without becoming liable upon the existing mortgage indebtedness secured upon the plant; and in the absence of any bond issue it is not necessary to submit to a popular vote the question of making a purchase under sec. 959—51, Stats. 1898. *Connor v. Marshfield,* 280

19. The act of 1897, when incorporated into the Revision as sec. 959—51, continued unchanged in meaning. *Ibid.*

20. A written contract between a city and a water and lighting corporation required a transfer by the corporation of all its property to the city, subject to a certain mortgage, and payment of a price by the city to the corporation. The property was actually delivered and surrendered by the corporate officers to the possession and management of the city officers and employees. *Held,* that the transaction constituted a purchase by the city of the equity of redemption in the property of the corporation under sec. 959—51, Stats. 1898, and that the transfer (provided for in the contract) to the city of the corporate stock and unissued bonds of the corporation was not a purchase of either to acquire control of the corporation as contemplated by sec. 927—1, but was merely a method of securing their cancellation. *Ibid.*

21. A city purchased a water and lighting plant subject to a mortgage thereon securing bonds issued by the vendor corporation. It did not assume payment of said bonds. Sec. 959—51, Stats. 1898, authorizing purchase of such an equity of redemption, provides that such purchase shall not create any liability on the part of the city to pay bonds so issued, "nor shall the amount of such bonds and mortgage . . . be deemed to be an indebtedness" of the city. *Held,* that such bonds are not an indebtedness of the city within the meaning of the constitutional limitation upon municipal indebtedness. *Ibid.*

22. Prior to the purchase of the plant the city had contracted with the corporation to pay certain hydrant rentals and, in case the corporation should at any time issue mortgage bonds, to pay directly to the trustee in the mortgage so much of said rentals, when and as they became due, as would discharge the interest on the bonds as it should mature, and to continue such payments so long as said interest should remain due and unpaid. *Held,* that this agreement, being merely a promise to pay for

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prospective services as they should be performed, did not constitute an indebtedness until such performance; and that the city did not by the purchase of the plant assume any new obligation to the bondholders in respect thereto. *Ibid.*

23. A finding by the trial court that the purchase by a city for $25,400 of the equity of redemption in a waterworks and lighting plant mortgaged for $125,000, was not, under all the circumstances, an unreasonable and improvident exercise of power, is *held* to be sustained by the evidence. *Ibid.*

24. The very broad discretion over questions of policy which is vested in municipal governments will not, under ordinary circumstances, be interfered with by the courts. *Ibid.*

25. After contracting to sell to the city the equity of redemption in a water and lighting plant, the vendor corporation gave to a third person a warranty deed of all the plant, franchises, etc., subject to rights of the city as purchaser. *Held* that, as the corporation had already, by the sale to the city, become relieved from the duties imposed by its original franchise, the transfer of its mere legal title by such warranty was not contrary to public policy. *Ibid.*

Taxpayers' right to restrain payments by city officers. See INJUNCTION, 2.

MURDER. See HOMICIDE, 2, 3.

NAVIGABLE RIVERS. See BRIDGES, 5, 6. WATERS.

NEGATIVE TESTIMONY. See RAILROADS, 10.

NEGLIGENCE. See AUTOMOBILES. EVIDENCE, 1. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 16. RAILROADS, 3–12. SALES, 1. TRIAL, 4.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL. See APPEAL, 6–9.

NOISES: Frightening horses. See AUTOMOBILES.

NOTICE.

To join in repairing bridge. See BRIDGES, 3.

Of persons insured by policy to carrier. See INSURANCE, 8.

Of loss. See INSURANCE, 10.

Of refusal to revive policy. See INSURANCE, 13, 14.

Of information as to applicant for revival of policy. See INSURANCE, 12.

Of danger to employee. See MASTER AND SERVANT, 2.

Of threats, etc., by mob. See MUNICIPAL CORPORATIONS, 14, 15.

Of trains, to sectionmen. See RAILROADS, 7.

Of meetings of administrative boards. See TAXATION, 55, 59.

A date being fixed by the law for the session of an administrative board to perform duties of a *quasi*-judicial nature, in which individuals are specially interested, no notice to the latter is necessary unless otherwise required by statute. *Chicago & N. W. R. Co. v. State* (26) 558, 654

OBLIGATION OF CONTRACT. See CONSTITUTIONAL LAW, 1, 2.

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OFFICERS.

Qualifications: Interest. See DRAINS.

Where commissioners or boards act in a ministerial, administrative, or *quasi*-judicial capacity, pecuniary interest (such as, in this case, the ownership of land in a proposed drainage district) does not disqualify them unless expressly so provided by statute. *In re Cranberry Creek Drainage Dist.* 98

Appointment: Commissioners of equalization. See TAXATION, 56.

Action on bond: Town treasurer. See PARTIES. STIPULATIONS.

Bribery: Attempts. See CRIMINAL LAW, 1, 2, 6–8.

Restraining acts of city officers. See INJUNCTION.

Railroad commissioner: Powers as to licenses to railroads. See TAXATION, 25–28.

OFFICIAL BONDS. See PARTIES. STIPULATIONS.

OPINION EVIDENCE. See EVIDENCE, 7–9.

ORDER OF PROOF. See TRIAL, 1.

ORDINANCES regulating automobiles. See MUNICIPAL CORPORATIONS, 11–13.

OVERT ACTS. See CRIMINAL LAW, 2.

PARTIES.

See FORFEITURES. JUDGMENT, 3. PLEADING.

1. If money is paid by a town treasurer, or by a bank having custody of the town moneys, for a known illegal purpose, the town may recover it from the payee or from the bank, their liability to the town, in such a case, being direct and primary; and the sureties on the treasurer's bond, upon being sued to make good the amount of such illegal payment, are entitled either to have a recovery against them postponed until exhaustion of the town's remedy against the persons primarily liable, or to have such persons made parties, to the end that there may be a complete and effective adjudication as to such primary liability and the extent of the rights of the town to which the sureties may be subrogated. *Washburn v. Lee,* 312
2. Under our Code (secs. 2657, 2656*a*, and 2610, Stats. 1898) such relief can be obtained fully by the sureties in the action against them on the bond. *Ibid.*

PARTITION of land. See WILLS, 11.

PARTNERSHIP. See SALES.

PATENTS and patented articles, etc.: Contracts for use of. See MUNICIPAL CORPORATIONS, 3–6.

PAYMENT on void contract with city. See INJUNCTION.

PENALTIES. See FORFEITURES. RAILROADS, 1. TAXATION, 28, 63–68.

PERSONAL INJURIES. See EVIDENCE, 1. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 14–16. RAILROADS, 3–12.

PERSONAL PROPERTY.
Situs for taxation. See TAXATION, 32–38.
Valuation: Franchises, etc. See TAXATION, 43–46.

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PLEADING.

Complaint: Sufficiency: Construction, etc. See ACTION. FRAUD, 2. JUSTICES' COURTS, 3, 5. RAILROADS, 3, 4.

Answer: Matter in abatement: Waiver.

In an action by a town to recover money alleged to be due it on contract, the objection that the electors did not in town meeting authorize the bringing of the action goes wholly in abatement, and, unless expressly pleaded, is waived. *Beloit v. Heineman*, 398

Issues and variance. See APPEAL, 1, 10. RAILROADS, 3, 4. STIPULATIONS.

Amendment. See APPEAL, 1, 10, 12. JUSTICES' COURTS, 5. RAILROADS, 4.

POSSESSION.
Of land. See WILLS, 11.
Of personalty. See INSURANCE, 6.

POWERS in trust. See WILLS, 11–14.

PRACTICE. See ACTION. APPEAL AND ERROR. CRIMINAL LAW AND PRACTICE. DIVORCE. EVIDENCE. FORFEITURES. JUDGMENT. JUSTICES' COURTS. PARTIES. PLEADING. RAILROADS, 3, 4. STIPULATIONS. TRIAL. VENUE. WILLS, 19–23.

PRECATORY WORDS. See WILLS, 13.

PREJUDICE: Change of venue. See CRIMINAL LAW, 9. VENUE.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 11.

PRESCRIPTION. See EASEMENTS.

PRESUMPTIONS. See EVIDENCE, 1–3. STATUTES, 2. TAXATION, 52. WILLS, 3–6.

PRIMARY LIABILITY on official bond: Enforcement. See PARTIES.

PRINCIPAL AND AGENT. See BROKERS.

PRINCIPAL AND SURETY. See BILLS AND NOTES, 2. PARTIES.

PRIVILEGE of witnesses. See CRIMINAL LAW, 3–8.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOFS OF LOSS. See INSURANCE, 10.

PROXIMATE CAUSE. See RAILROADS, 6. TRIAL, 4.

PUBLIC POLICY. See MUNICIPAL CORPORATIONS, 23–25.

RAILROAD COMMISSIONER. See TAXATION, 25–28.

RAILROADS.

Taxation. See TAXATION.

Regulation of speed of trains: Forfeitures. See FORFEITURES.

1. Sec. 1809*a*, Stats. 1898, prohibits the running of trains or engines faster than fifteen miles an hour in cities and villages in which gates are maintained as therein provided; but sec. 1809 still prohibits a greater speed than six miles an hour in all other cities and villages, and a violation of sec. 1809 subjects a railroad corporation to the forfeiture prescribed in sec. 1819. *State v. Wis. Cent. R. Co.* 79
2. Legislative restriction of the speed of railroad trains to six miles an hour in cities and villages is not unreasonable. *Ibid.*

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Negligence: Injuries to passengers: Pleading.

3. In an action against a railway company for injuries sustained by a passenger the complaint alleged that after defendant's servants had announced the arrival of the train at her station, and after it had come to a standstill, plaintiff arose from her seat and proceeded forward for the purpose of alighting, but before she had had a reasonable time to get off the train it was negligently and violently started and jerked, whereby plaintiff was thrown to the floor and injured. *Held*, that this allegation was broad enough to cover negligent management of the train in suddenly and violently starting it up while plaintiff was in the course of alighting, whether such starting was immediately before or immediately after the train came to a stop; and defendant having fully litigated such issue, and the jury having found that though the train was not started and jerked after it came to a stop, yet defendant's negligence in bringing the train to a stop was the proximate cause of the injury, plaintiff was entitled to judgment on the verdict. *Hopkins v. C., M. & St. P. R. Co.* 403

4. If an amendment of the complaint were necessary, in such case, to make it conform to the proof and finding, it should have been permitted, all material questions having been fully tried and defendant not having been misled by the allegation of the complaint. *Ibid.*

Same: Incredible testimony: Setting aside verdict.

5. Plaintiff's uncorroborated testimony in this case that his injury (the cutting of his foot nearly off) was sustained when he was ejected from defendant's passenger train was rendered incredible by physical and established facts; and the verdict awarding him damages for that injury was so wholly unsupported that it was error not to set it aside. *Peat v. C., M. & St. P. R. Co.* 86

Injury to pedestrian at street crossing.

6. The evidence in this case (stated in the opinion) is *held* to permit the inferences that plaintiff—then a boy about six years old—was struck by an engine at a street crossing through defendant's negligence, and that such negligence was the proximate cause of his injury. *Ritter v. C., M. & St. P. R. Co.* 276

Injury to employee: Sectionman: Assumption of risk: Evidence as to warnings.

7. Sectionmen upon railroads assume the risk of trains of all sorts, regular or "wild," running over the tracks at all times and at such rates of speed as are attainable, without notice or warning except such as results incidentally from the ordinary noises of the train, including such bell and whistle signals as are customary. *Ives v. Wis. Cent. R. Co.* 357

8. Such rule applies to trains running at unlawful speed within the limits of a city, where the sectionmen, knowing such unlawful speed to be customary, accept and continue in the employment subjecting them to peril from such practice. *Ibid.*

9. The fact that the particular train which injured a sectionman was a freight train running at a greater speed than such trains ordinarily maintained at the place and under the circumstances in question, did not show that the risk was not one assumed by him under the rule. *Ibid.*

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10. The positive testimony, based upon positive recollection, of conductor, engineer, and fireman, all of whom were upon the engine, that the bell and whistle were sounded as they approached a highway crossing, was sufficient to establish that fact conclusively, as against the testimony of a section foreman, who was approaching from the opposite direction on a railroad velocipede, that he heard neither whistle, bell, nor roar of the approaching train, but who further testified that the ringing noise made by the velocipede made it difficult to hear other sounds. *Ibid.*

11. There being conclusive evidence that the bell and whistle on an engine were sounded at a crossing just before a sectionman was struck and injured, testimony as to how far such sounds could be heard was immaterial. *Ibid.*

12. The fact that a sectionman was proceeding along the track under the orders of his section foreman did not relieve him from his assumption of the peril of passing trains, of which the foreman had no superior knowledge. *Ibid.*

RATIFICATION of acts of agent. See INSURANCE, 9, 10.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See BROKERS. EASEMENTS. EQUITY, 8. EXECUTORS. JUDGMENT, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 7–10, 25. TAXATION, 43, 49–51. TAX TITLES. VENDOR AND PURCHASER. WILLS, 11–18.

REBUTTAL. See TRIAL, 1.

REDEMPTION of land from tax sale: Constructive redemption. See TAX TITLES.

REFERENCE: Report when advisory. See DIVORCE, 3.

REMEDIES.
Election between. See FRAUD, 1, 2.
At law or in equity? See EQUITY.
Ordinary or *mandamus?* See BRIDGES, 2. MANDAMUS.
Creditors' remedies. See BILLS AND NOTES, 1. FRAUD. SALES.

REPORTING CASE to supreme court. See CRIMINAL LAW, 15.

RESCISSION. See BILLS AND NOTES, 1. EQUITY, 7. EXECUTORS. SALES, 1–3. VENDOR AND PURCHASER.

RES JUDICATA. See JUDGMENT, 3.

RESTRAINT OF TRADE. See CONTRACTS, 2, 3.

RETURN of gross earnings by railroad: How far conclusive. See TAXATION, 25, 26.

REVIVAL of lapsed policy. See INSURANCE, 11–14.

REVOCATION of contract. See BROKERS, 2. CONTRACTS, 4.

RIGHT OF WAY. See EASEMENTS.

RIVERS. See BRIDGES, 5, 6. WATERS.

ROADS AND STREETS. See BRIDGES. INJUNCTION, 1. JUDGMENT, 3. MUNICIPAL CORPORATIONS, 3–10.

SALES.

Restraint of trade. See CONTRACTS, 3.

Sale of one's own promissory note: Exchange of notes. See BILLS AND NOTES, 1.

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Sales induced by fraud: Remedies: Rescission, etc. See BILLS AND NOTES, 1. EQUITY, 7. FRAUD.

1. Where one partner without having read a contract for the purchase of goods was induced to sign it in the firm name by false representations of the vendor's agent that the other partner had seen and approved the contract and left it for him to sign, and such false representations were such as, under the circumstances, reasonably excused the signing partner from reading the paper, the firm had the right, acting seasonably, to rescind the contract. *Standard Mfg. Co. v. Stallmann,* 375
2. A sale of property cannot be set aside as fraudulent because of the mere fact that the buyer, not being asked, did not disclose his insolvency. There must also have been an intention on his part not to pay. *German Nat. Bank v. Princeton Bank,* 60
3. The situation and circumstances of the buyer may be shown and may justify an inference that he could have had no reasonable hope of ever being able to pay, but had, rather, a definite purpose not to pay; but this inference is one of fact, not of law, and a finding of the trial court thereon will not be disturbed unless clearly against the preponderance of the evidence. *Ibid.*

Evidence: Burden of proof, etc.: Instructions to jury: Immaterial errors. See EVIDENCE, 2, 3.

4. In an action to recover money paid for goods which were afterwards returned to the vendors, permitting plaintiff's husband to testify that she did not owe defendants anything is *held,* in view of other testimony, not to have been prejudicial error, although the question called for a conclusion. *Bazelon v. Lyon,* 337
5. Permitting plaintiff's husband to testify that before paying for them he wished to examine goods shipped by defendants to plaintiff, because he "wouldn't trust" defendants, is *held,* in view of other testimony, not to have been prejudicial error. *Ibid.*
6. A statement in the charge that "the goods did not correspond with the order and were returned" is *held* not a prejudicial error although the evidence on that point was conflicting, the only contested issues being whether plaintiff had received credit for the goods so returned and whether defendants were entitled to anything on their counterclaims. *Ibid.*

SALES OF LAND. See BROKERS. EQUITY, 8. EXECUTORS. VENDOR AND PURCHASER.

SALES FOR TAXES. See TAX TITLES.

SCALEMENT of logs: Evidence. See LOGS AND TIMBER.

SCHOOLS AND SCHOOL DISTRICTS: Issuance of bonds: Right of women to vote. See ELECTIONS. MUNICIPAL CORPORATIONS, 17.

SEPARATE TRIAL of issue of immunity. See CRIMINAL LAW, 12, 15.

SPECIAL ASSESSMENTS. See INJUNCTION. MUNICIPAL CORPORATIONS, 3–6.

SPECIAL VERDICT. See JUDGMENT, 1.

SPEED.
Of trains. See RAILROADS, 1, 2, 7–9.
Of automobiles. See MUNICIPAL CORPORATIONS, 11–13.

STATE BOARD OF ASSESSMENT: Ministerial duties. See TAXATION, 59.

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STATUTES.

Validity in general: Essentials: Provision for execution.

1. The fact that a legislative enactment does not provide in all details for its execution does not necessarily render it void. When the law imposes a duty and fails to provide, specifically, for the manner of performance, and the act to be done is of an ordinary character readily performable by the use of the ordinary instrumentalities of the corporation, by necessary implication power to so perform springs from the imposition of the duty itself. *Bloomer v. Bloomer,* 297

Constitutionality. See CONSTITUTIONAL LAW.

2. It must be presumed in favor of an act of the legislature that the lawmaking power intended a valid enactment, and it is to be sustained if in any reasonable view thereof it can be fairly read in harmony with constitutional requirements. *Chicago & N. W. R. Co. v. State* (23) 557, 650

Construction. See CORPORATIONS CRIMINAL LAW, 1, 3–8, 15. DRAINS. ELECTIONS. EVIDENCE, 6. JUSTICES' COURTS, 3. LOGS AND TIMBER, 1. MUNICIPAL CORPORATIONS, 3–6, 9, 10, 12, 14, 17–21. PARTIES, 2. RAILROADS, 1. TAXATION, 14–31, 49–68. VENUE. WATERS. WILLS, 11, 18, 20, 24.

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STIPULATIONS.

In an action by a town on the bond of its treasurer, based on his failure to account for certain moneys, it was stipulated that unless a certain payment was illegal the treasurer had accounted for all moneys received. Defendants, in proving that such payment was not illegal, proved that the amount paid had been immediately repaid to the treasurer so that he again became chargeable therewith; and it appeared that he had not further accounted therefor. *Held*, that while it might have been proper to allow plaintiff to be relieved from the stipulation and to base its claim on the later failure to account, yet it was error to grant a recovery on such new claim without giving to defendants an opportunity to meet it by any defense they might have thereto. *Washburn v. Lee*, 312

STREETS AND ALLEYS. See MUNICIPAL CORPORATIONS, 3–10.

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TAXATION.

Constitutional rule of uniformity: Classification of property: Railway property.

1. The first clause of sec. 1, art. VIII, of the constitution, declaring that the rule of taxation shall be uniform, relates to all property taxed directly, and that only. *Chicago & N. W. R. Co. v. State* (1) 554, 588–591
2. Sec. 1, art. VIII, aforesaid does not limit the exercise of the power of taxation to that on property. *Id.* (2) 554, 604
3. Sec. 1, art. VIII, of the constitution limits taxation of property to such as the legislature shall prescribe, makes all such property one class, and ordains that the rule of taxation shall be uniform in respect thereto. *Id.* (3) 554, 603, 604
4. The second clause of such section leaves the legislature unlimited authority as to what property shall be taxed and what shall not be taxed, subject to other equality clauses of the organic law, particularly sec. 1, art. I. In prescribing property for taxation all of any particular class must be so prescribed or be exempted. *Id.* (4) 554, 604, 606

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5. In prescribing property for direct taxation, or instrumentalities to effect such taxation, but not otherwise, under sec. 1, art. VIII, of the constitution, the legislature may classify and subclassify property, to the extent of distinguishing differences as to a particular class or subclass, reasonably requiring special treatment to promote the constitutional requirement that as to all property taxed the rule of taxation shall be uniform. *Id.* (5) 554, 609, 613, 655

CASSODAY, C. J., is of the opinion that under sec. 1, art. VIII, Const., the legislature has power to classify property for the purposes of taxation, and then to impose different rates of taxation upon the different classes. *Id.* 559, 677

6. The rule of uniformity has reference to uniformity of burden, not necessarily uniformity of methods of imposing burdens and realizing thereon. *Id.* (6) 554, 613, 614

7. The rule of uniformity for direct taxation on property is the rule ordained by the constitution itself, vitalized by legislative essentials necessary to its execution and aided by legislative details promoting its purpose to burden every dollar in value of all property prescribed for direct taxation, having regard to special conditions in the respective taxing districts, the same, as near as practicable, as every other dollar in value of such property is burdened. *Id.* (7) 555, 613

8. It is within legislative discretion to place railway corporations in a class by themselves as regards instrumentalities for imposing upon their property the same rate of taxation, as near as practicable, as is imposed on all other property throughout the state, the design as to such instrumentalities being, in the judgment of the legislature, reasonably appropriate to effect the purpose that all property taxed directly shall be burdened according to the mandate of the constitution, that the rule of taxation shall be uniform. *Id.* (27) 558, 655

Ordinary and privilege taxes: Latter involve contract obligations: Not subject to rule of uniformity: Corporations: Railroad companies.

9. A tax in the ordinary sense is not a debt: it does not involve any element of contractual obligation and is not enforceable by ordinary remedies for the collection of debts, without statutory authorization in that regard. *State v. Railway Cos.* (17) 451, 485, 500–503

10. A privilege tax involves contract obligations. The acceptance of the privilege implies a promise to pay the statutory equivalent therefor, and the obligation may be enforced by ordinary remedies for the enforcement of ordinary contract obligations. *Id.* (18) 451, 500

11. The ideas involved in a privilege tax are these: The state offers a privilege on condition of being compensated therefor. The acceptance of such offer creates a contract. The law operating upon the acts of the parties raises the implied promise to pay the required compensation. The full consummation of the transaction involves the exchange of equivalents, the same as in any other case of an executed contract. *Id.* (19) 451, 500

12. The privilege tax exacted from a corporation for opportunity of conducting its business in this state is not within sec. 1, art. VIII, of the constitution. It is referable to the taxing power

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in the general sense, the contracting power, the right reserved to amend corporate charters, and the right to exempt property from taxation. *Id.* (20) 451, 505, 507

13. When a corporate charter, originally or by amendment under the reserved power of the legislature in that regard, conditions the exercise of a corporate privilege upon the corporation paying to the state a proportion of its income, the acceptance of the charter, originally or as amended, by operating under it, creates a contract between the state and the corporation. The exaction, when plainly made for revenue, is a tax in "the just and proper sense of the term:" in the broad view which includes all public revenues derived from persons, natural or artificial, but is, at the same time, a debt, not a tax in the constitutional sense: a tax merely involving the reciprocal duties between sovereign authority and those enjoying its benefits. *Id.* (23) 452, 505, 509

14. Sec. 1212 of the Statutes imposes an obligation for payment to the state by every railroad company of the full stated percentage of its gross earnings, as a consideration for the privilege of operating its road. The acceptance of the privilege creates a debt to the state for the full amount thereof. *Id.* (24) 452, 500, 506

15. Upon acceptance by a railroad company of the offered privilege to operate its road by actually operating the same, the obligation to pay the stated compensation therefor becomes fixed, rests on contract, and is fully redeemable only by fully paying the same, as in case of any other absolute obligation to pay money. *Id.* (25) 452, 506

16. There is no difference, as regards the contract basis, between exactions from foreign corporations and those from domestic corporations for the privilege of doing business in this state. *Id.* (26) 452, 505

Railroad companies: License fees based on gross earnings: Not taxes in constitutional sense: Administrative features: Return, approval, etc.

17. Ch. 74, Laws of 1854, the original act in this state for obtaining public revenue from railroads, is the same, in all essential features, as secs. 1211 to 1214, inclusive, Stats. 1898, except as modified by ch. 174, Laws of 1860. *State v. Railway Cos.* (2) 449, 475

18. The sections of the present statutes mentioned, except as they have been displaced by the *ad valorem* method of obtaining revenue from railroad companies, have not been changed except by ch. 308, Laws of 1899, providing that the license shall issue only on approval by the railroad commissioner of the return required by sec. 1211. *Id.* (3) 449, 481

19. The original law did not impose a tax on railroad property, or a tax at all, within the meaning of sec. 1, art. VIII, of the constitution, though it did impose a tax "in the just and proper sense of that term" in that it imposed on the owners of property the duty of contributing, indirectly, on account thereof to the public revenue. *Id.* (4) . 450, 484, 485, 490

20. The basic ideas of the law of 1854 are (1) an exemption of railroad property from ordinary taxation, such as is dealt with by the constitutional provisions on the subject; (2) an exaction,

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tax so called, in lieu thereof and in consideration of the exemption, based on the business in which the property is used. *Id.* (5) 450, 490, 491

21. The idea that an exaction in lieu of taxation mentioned in the constitution is such taxation in fact, is a palpable *non sequitur*. *Id.* (6) 450, 490

22. Ch. 174, Laws of 1860, in connection with a companion enactment, neither, however, referring to the other, preserved the features of the law of 1854 as regards an exaction from the owner of railroad property, based on the business of the road, in lieu of and as compensation for exemption of such property from ordinary taxation—that under the constitutional provision referred to—but omitted all features giving rise to the controversy as to whether it was the latter, and added those features suggested in previous opinions in this court, as giving such an exaction the character of compensation for the privilege of operating the road. *Id.* (7) 450, 493–496

23. Sec. 1212 of the Statutes imposed an absolute obligation on every railroad company doing business in this state, to pay to the latter the proportion of gross earnings mentioned in sec. 1214, as compensation for the privilege of operating its road. *Id.* (8) 450, 500

24. The other features of secs. 1211 to 1214, inclusive, are administrative in character, and intended only to secure certainty of performance as to the obligation created by sec. 1212. *Id.* (9) 450, 503

25. The purpose of the return of gross earnings required by sec. 1211, is to enable the state to determine the proportion of such earnings to which it is entitled as compensation for the privilege accorded of operating the road for the ensuing year, and, though approved by the railroad commissioner, it is only *prima facie* binding as to the real right of the matter. *Id.* (10) 450, 503

26. The duty of the railroad commissioner under the law of 1899, as to approving the return of gross earnings made under sec. 1211, is administrative in character. The legislative idea is that the return, only when approved as required, shall be *prima facie* evidence of the correct basis for determining the amount to be paid to the state. *Id.* (11) 450, 480

27. The law of 1899 contemplates that the approval of the return shall precede the application for the license. *Id.* (12) 451, 478

28. The power of revocation of the license, reserved in sec. 1212, is exercisable in case of any default in performing the obligation created by such section and acceptance of the privilege. *Id.* (13) 451, 514

29. The statement of points decided by this court as to whether ch. 74, Laws of 1854, imposed a tax in a constitutional sense, which appears in vol. 9 of the official reports at page 449, is a *verbatim* copy of the decision of the question made by this court November 17, 1855. *Id.* (14) 451, 491, 492

30. The determination so made as to the law of 1854 not imposing a tax "within the meaning of the constitutional provisions" has been the settled law of this state since 1862, and so far as the features of such law, in letter or spirit, are included in secs. 1211 to 1214, inclusive, such decision establishes the character thereof as regards whether they deal with taxation in a constitutional sense. *Id.* (15) 451, 497, 498

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31. The character of the law of 1854 as regards not imposing a tax "within the constitutional provisions" is emphasized in secs. 1211 to 1214 aforesaid, in that by exclusion and inclusion the idea of a tax in a constitutional sense was carefully omitted therefrom and repelled by its affirmative features, and the idea of a privilege tax resting on contract obligations was included. *Id.* (16) 451, 496

CASSODAY, C. J., and DODGE, J., dissent from the doctrine that the exactions from railroad companies under the license system were not "taxes" within the meaning of sec. 1, art. VIII, Const. *Id.* 517–519

Situs of property for taxation: Power of legislature: Railway property.

32. The legislature cannot arbitrarily or capriciously give property a situs for taxation. Tax burdens must be imposed on the state at large, the county at large, and on the smaller taxing districts at large, according as the purpose thereof is purely general or purely local to the particular taxing district. *Chicago & N. W. R. Co. v. State* (28) 558, 661

33. The scope of the power of the legislature to fix the situs of railway property for taxation has regard to the nature of such property as personalty. *Id.* (29) 558, 662

34. The doctrine that the situs of personal property for taxation is the home of the corporation, is the law of the state only in the absence of a law fixing some other situs within constitutional limitations. *Id.* (30) 558, 665

35. The limit of legislative power as to territory in fixing the situs of personal property for taxation is not the taxing districts in which the visible part of the railroad and its office or offices are located. *Id.* (31) 558, 665

36. The limitation above mentioned includes any taxing district where such relations exist between it and the owner of the property, either directly or with reference to such property, that, reasonably, it may be said the duty to pay the tax is a return obligation for some duty of the payee to extend to the former, either as to person or property, the benefits of its government. *Id.* (32) 558, 665

37. Whether the relations stated exist in any given circumstances is a legislative question, and wholly beyond judicial interference, except in case of manifest caprice or violation of the command that the rule of taxation shall be uniform. *Id.* (33) 558, 665

38. The peculiar nature of railway corporations as to their commanding position, the universality and closeness of their touch with the everyday life of the people, the mutual relations of dependence for well-being both as to persons and property, reaching the state at large, the needs of such corporations as to support and protection, the significant degree in which the administrative energy of all departments of the state is devoted to affairs concerning their regulation and well-being, and their public privileges springing from the whole people, warrant the exercise of legislative power, giving to their property for the purposes of taxation a general situs, and applying thereto the average rate of taxation throughout the state on general property prescribed for taxation, whether regarded as having a situs throughout the state or one limited to the taxing districts touched by their tracks. *Id.* (34) 558, 666–669

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Levy of taxes: Legislative power: Delegation of administrative duties.

39. A tax, state or local, must be levied, in the sense of voting the tax, by the legislative power to which the same is referable. That cannot be delegated to administrative officers. The act of laying the tax, and of determining the basis thereof as regards the valuation of property on the legislative plan, is administrative. The former is an act of making law, the latter of executing it. *Chicago & N. W. R. Co. v. State* (14) 555, 629

40. When the legislature determines to raise a stated sum of money by taxation, or the sum which a specific form of taxation may produce, and delegates to administrative officers the duty of ascertaining facts and making computations from given data or facts to be ascertained by such officers and of thereby fixing the rate and eventually the amount of the tax, it levies the same in a constitutional sense. *Id.* (15) 556, 629

Same: Constitutional provisions: Legislative estimate.

41. Sec. 5, art. VIII, providing that "the legislature shall provide for an annual tax sufficient," etc., "and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year sufficient, with other sources of income," etc., is satisfied if the legislature determines, as shown by what it does, to raise by taxation a specific sum for public purposes, or such sum as the form of taxation adopted will produce. No express legislative estimate of the public needs is necessary, nor is annual or biennial legislation necessary. A law in that regard may provide generally for the future or till changed by the legislature. *Chicago & N. W. R. Co. v. State* (16) 556, 631, 634

42. Sec. 2, art. VIII, of the constitution, and sec. 5 are to be read together. The latter limits the exercise of the taxing power to public purposes, and the former, likewise, limits the use of the avails of such exercise. They do not limit the method of determining the needs therefor. *Id.* (17) 556, 634

Assessment: Public service corporations: Railways: Private corporations: When property valued as a unit and as personalty.

43. The property of a public service corporation is to be valued for taxation as a unit, the franchise element and tangible elements, whether in land or movables, being regarded as inseparable parts of one thing in which the former so far predominates as to stamp all with the impress of personal property. *Chicago & N. W. R. Co. v. State* (8) 555, 617–620

44. In assessing property of ordinary corporations or of firms or individuals, the same is to be valued with reference to its use, situation, and all that concerns the same, no value being placed on such intangibles as good will or mere ordinary corporate rights or other mere circumstances other than as the same is included in the actual value of the tangible things, in the places and under the conditions in which they are found. *Id.* (9) 555, 617

45. Property owned by mere private corporations is to be valued the same as if owned by a private person. *Id.* (10) 555, 625

46. In assessing railway property for taxation, the assessing agency is not concerned with physical value, except as evidence of physical conditions; nor specially concerned with franchise

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value. All is to be valued as a unit, inseparable for the purpose of valuing any one element or determining the value, in the whole, by adding together the separate values of elements. *Id.* (11) 555, 620–624

Same: Errors and omissions of assessors.

47. If the assessing agency, in valuing the general property taxed, commits jurisdictional or other error by including property not assessed by local assessors, such error affords owners of special property no ground for invoking equity jurisdiction. *Chicago & N. W. R. Co. v. State* (12) 555, 625, 626

48. Unintentional omissions in assessing property for taxation, referable to mere error of judgment or inadvertence; or differences between different assessors as to the treatment of the same kind of property under the same or similar circumstances, or other mere errors of judgment or mistakes without fraud, do not affect the validity of the tax. *Id.* (13) 555, 626, 627

Same: Mortgages: Statute construed.

49. The effect of ch. 378, Laws of 1903, is to exempt from taxation, in cases mentioned, as personal property, any ordinary mortgage or lien in the nature of a mortgage on realty, and the debt secured thereby to the extent of the value of the security, such value being regarded as an interest in the realty in place of such mortgage and such part of the mortgage indebtedness, and to make the same taxable to the mortgagee separately from the value of the equity or to the mortgagor with the equity, the same as if the land were unincumbered, at the latter's option. *Chicago & N. W. R. Co. v. State* (19) 556, 637–639

50. Under such law, so much of the mortgage indebtedness as measures the value of the security is excluded from that which the mortgagor may set off against his credits in determining the excess of the latter over his liabilities, and so subject to taxation, and is also not available to the mortgagee in making up his balance of credits over liabilities subject to taxation, but the excess of the mortgage indebtedness over the value of the security is a matter receivable as to the mortgagee and payable as to the mortgagor, to be taken account of by them respectively in determining the amount of their respective credits subject to taxation. *Id.* (20) 557, 638

51. The classification of mortgage indebtedness, as indicated, is legitimate under the doctrine of classification before stated. *Id.* (21) 557, 647

Equalization of assessments: Commission: Powers and proceedings.

52. The proceedings of commissioners of equalization appointed under sec. 1077*a*, Stats. 1898, if conducted in good faith and within their jurisdiction, are final and conclusive; and a want of jurisdiction must be affirmatively shown. *Foster v. Rowe,* 326

53. A broad discretion is vested in such commissioners respecting the taking of testimony; and their refusal to hear evidence that property was omitted from the tax roll in a certain city does not render their determination void. *Ibid.*

54. The power to equalize taxes is a *quasi*-judicial power, and is not legislative in the sense that it cannot be delegated by the legislature to a board. *Ibid.*

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55. The commission of equalization provided for in sec. 1077*a*, Stats. 1898, acts upon the different municipalities in the county, not upon the individual taxpayers; and the fact that no notice to taxpayers is required does not render the statute void as depriving any person of property "without due process of law;" nor does the statute deny to the taxpayer "the equal protection of the laws." *Ibid.*

56. Sec. 1077*a*, Stats. 1898, providing for appointment of commissioners of equalization by the circuit judge, is not unconstitutional on the ground that it imposes nonjudicial power upon such judge. *Ibid.*

57. Where commissioners of equalization appointed under sec. 1077*a*, Stats. 1898, had fully performed their duties and made their determination before the repeal of that statute by ch. 474, Laws of 1905, such repeal did not affect their determination. *Ibid.*

Rate of taxation: Railway property: Average rate of preceding year: Constitutional law.

58. The feature of ch. 315, Laws of 1903, as to applying the average rate of taxation on general property one year on the value of railway property as to such year, in taxing the latter the succeeding year, is legitimate, regarded as a reasonable exercise of legislative judgment as to the method of burdening railway property with state and local taxes, except special assessments, the same as general property throughout the state, as near as practicable, and is consistent with sec. 1, art. VIII, of the constitution. *Chicago & N. W. R. Co. v. State* (22) 557, 648

Same: Determination of average rate: Notice.

59. The duty of the state board under ch. 315, Laws of 1903, as to determining the average rate of taxation on general property is wholly ministerial. No notice to the owners of railway property, or proceedings in that regard, with opportunity to be heard, is required under the constitutional provision as to due process of law, and none whatever except as provided by the written law. *Chicago & N. W. R. Co. v. State* (25) 557, 652

Same: Taxation of railway property as unit: Avails belong to state: Constructive accounting with minor taxing districts.

60. The rule that property of a railway corporation, for the purposes of direct taxation, must be valued as a unit, reasonably demands that such value be treated as a unit, and, to the end that the rule of taxation may be uniform, that the average rate of taxation on general property throughout the taxing districts which, in any reasonable view, are entitled to participate in taxing such property, be applied thereto, and the avails be treated as belonging to the state for public purposes, on the theory of a constructive accounting between it and such taxing districts. *Chicago & N. W. R. Co. v. State* (35) 559, 670–676

61. The purpose of the *ad valorem* railway taxing law being to tax railway property upon the same basis and at the same rate as other property prescribed for direct taxation throughout the state is taxed, exclusive of special assessments, the avails in money should be regarded as the result, in effect, of state, county, city, town, village, and school and road district taxation, and as taking the form of state funds by a constructive accounting between the state and the localities. *Id.* (18) 556, 635, 636

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62. It is considered that ch. 315, Laws of 1903, contemplates, in effect, state and local taxation of railway property the same as of other property, as near as practicable, the state acting as agent for the localities and the latter for the former, the avails of the imposition on the railway property, after reaching the state treasury, and the corresponding results of the local impositions, after reaching local treasuries, remaining with the respective agencies for their use, as upon a constructive accounting and exchange of equivalents. *Id.* (24) 557, 651, 652

Penalties and forfeitures: Enforcement: Taxes involving contract obligations: Mistakes: Statutes construed.

63. A penalty imposed by the statute for failing to perform a legal duty as regards payment of a tax, strictly so called: a tax not involving any contract element, when incurred becomes, in effect, a part of the tax, and cannot be avoided whether the default be excusable or inexcusable from a moral standpoint. It cannot be forgiven at all, any more than the tax itself, in the absence of legislative authorization to that effect. *State v. Railway Cos.* (27) 452, 498, 499

64. The pecuniary penalty feature in sec. 1214, enforceable in respect to failure to pay any portion of the compensation due the state from any railroad company for the privilege of operating its road, being an instrumentality for the enforcement of a tax characterized by a contractual obligation to pay it, it does not necessarily follow from such a default that the penalty is collectible regardless of whether such default is excusable, testing the matter by principles of natural justice. *Id.* (28) 453, 511, 512

65. In case of a penal statute in aid of the enforcement of contractual obligations, such strict construction thereof in favor of the party upon which it bears is permissible as will avoid so reading it as to violate principles of natural justice, in the absence of unmistakable language in the act to the contrary. Such a statute if necessary to avoid manifest oppression may be construed by quite as arbitrary a rule as is applied to a penal feature in an ordinary contract. *Id.* (29) 453, 512

66. When the literal sense of a statute, if adopted as the legislative meaning, would lead to some absurd result, or shock the ordinary sense of justice, it is to be rejected, if some other meaning which is reasonable can be readily read therefrom by the aid of any rule for judicial construction which is applicable, and can reasonably be seen to be the real intent of the legislature. *Id.* (30) 453, 512, 513

67. The pecuniary penalty of $10,000 for any default specified in sec. 1214,—as applicable to mere mistakes of law or fact or both, not involving inexcusable neglect or moral turpitude, or difference of opinion fairly warranting resort to judicial assistance for the discovery of the truth,—would be so unreasonable as to strongly suggest that no such purpose was intended by the legislature, in the absence of language unmistakably showing to the contrary. *Id.* (31) 453, 515

68. The term "absolutely forfeit," as used in sec. 1214, does not so unmistakably show as aforesaid. It may reasonably be read as meaning that in case of the penalty being incurred by reason of a default not attributable, reasonably, to excusable mistake of law or fact or both, or some controversy fairly warranting resort to judicial aid for its solution, the forfeiture shall be ab-

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solute as in case of a penalty in aid of the collection of an ordinary tax, or stipulated damages in aid of an ordinary contract. *Id.* (32) 453, 515, 516

Sales of land for taxes: Constructive redemption. See TAX TITLES.

TAXPAYERS' ACTION. See INJUNCTION, 2.

TAX TITLES.

Where the failure to redeem lands from a certain tax sale was as much due to the fault and neglect of the redemptioners in failing to call the attention of the county clerk to such sale as it was to the fault of the clerk in omitting that sale from his statement of the amount required to redeem, it was error to hold that there had been a constructive redemption from that sale. *Menasha W. W. Co. v. Harmon,* 177

TESTAMENTARY CAPACITY. See WILLS, 1.

TITLE to land. See BROKERS, 4. EASEMENTS. EQUITY, 8. JUDGMENT, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 7–10, 25. TAX TITLES. WILLS, 11–18.

TORTS. See ACTION. AUTOMOBILES. FRAUD. JUDGMENT, 2. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 14–16. RAILROADS, 3–12.

TOWNS.

Joint maintenance of bridges. See BRIDGES.

Lease of property: Estoppel of lessee to question power.

One who, under a lease from a town, has used its property cannot question the power of the town to make such lease in order to repudiate his agreement to pay for what he has received thereunder. *Beloit v. Heineman,* 398

Portions attached to city for school purposes: Right to vote on question of bonds. See ELECTIONS, 6.

Authority to bring action: Abatement. See PLEADING.

Action on bond of treasurer: Judgment. See PARTIES. STIPULATIONS.

TRIAL.

Place of trial. See CRIMINAL LAW, 9. VENUE.

Issues triable. See APPEAL, 1. STIPULATIONS.

Separate trial of issue of immunity. See CRIMINAL LAW, 12, 15.

Order of proof: Rebuttal.

1. It was competent to permit a witness (plaintiff's agent) to testify on rebuttal as to whether or not he wrote a letter at a certain time which a witness on the other side attempted to show he had written at that time. *Bazelon v. Lyon,* 337

Taking case or question from jury. See LOGS AND TIMBER, 2. RAILROADS, 10.

2. The question as to the proper theoretical rating of a boiler was one within the field of expert inquiry; and evidence of confessedly nonexpert witnesses, whose method of measurement was, according to the undisputed credible expert testimony, wrong and entirely unlikely to show the proper rating of the boiler, was insufficient to carry the question to the jury as against expert testimony on the other side. *United States Heater Co. v. Jenss,* 162

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Instructions to jury. See APPEAL, 2. CONTRACTS, 1. CRIMINAL LAW, 13, 14. EVIDENCE, 3. LOGS AND TIMBER, 2. SALES, 6.

3. A charge to the jury confusing burden of proof and preponderance of evidence, and stating that if, after considering all the testimony, the jury are *inclined to the opinion* that plaintiff is entitled to recover, then he has established his claim by a preponderance of the testimony, is *held* prejudicially erroneous. *Eichman v. Buchheit,* 385

4. A charge defining proximate cause as "the efficient cause from which the injury follows in unbroken sequence without any intervening cause to break the continuity," is erroneous. *Ibid.*

5. Reduction of the charge to writing before giving it to the jury, in order to avoid the looseness of construction, repetition, and inaccuracy of statement inevitable in an oral charge, is strongly urged. *Ibid.*

Same: Communication with jury after cause submitted.

6. No communication should be had between the judge and jury after the submission of the cause except in open court. The presence of counsel is not indispensable, but it is the better practice to procure such attendance. *Hurst v. Webster Mfg. Co.* 342

Verdict: Addition of interest thereto.

7. Where plaintiff, if he recovered at all, was entitled to recover interest from the commencement of the action, and under the charge the jury could not have included such interest in their verdict, it was not error to add such interest to the amount of the verdict. *Hurst v. Webster Mfg. Co.* 342

Same: Contrary to successful party's own evidence. See HOMICIDE, 1.

8. The fact that a verdict is contrary to a part of the evidence of plaintiff and his witnesses does not preclude a recovery by him thereon if it is supported by the evidence in the case. *Hopkins v. C., M. & St. P. R. Co.* 403

Same: Supported and unsupported by evidence. See APPEAL, 6–9. RAILROADS, 5, 6.

Same: Setting aside or changing answers in special verdict. See JUDGMENT, 1.

Findings by the court: Law or fact? See SALES, 3.

TRUSTS AND TRUSTEES. See WILLS, 7–14.

UNDUE INFLUENCE. See WILLS, 5, 6.

VALUATION of property. See TAXATION, 43–50.

VALUE. See EVIDENCE, 7.

VARIANCE. See APPEAL, 1, 10. RAILROADS, 3, 4. STIPULATIONS.

VENDOR AND PURCHASER OF LAND.

See CONTRACTS, 3. EXECUTORS.

Where one was induced by the vendor's false representations to purchase land which, had such representations been true, would have been worth considerably more than it in fact was, he is entitled to a rescission even though the land was actually worth what he paid for it. *Greiling v. Watermolen,* 440

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VENUE.

See CRIMINAL LAW, 9.

Under sec. 2625, Stats. 1898, upon an application for a change of venue because of prejudice of the judge, the court has at least until the last day of the term at which such application was made to make the order changing the venue, and is not obliged to determine immediately whether he will order such change or call in another judge; and where it appears that the judge intends to comply with the law either by changing the venue or calling in another judge within the time provided by the statute, *mandamus* will not lie to compel him to act at once. *State ex rel. Deleglise v. Goodland*, 57

VERDICT. See APPEAL, 6–9. JUDGMENT, 1. TRIAL, 7, 8.

VILLAGES. See BRIDGES.

VOLUNTARY APPEARANCE. See JUSTICES' COURTS, 2.

WAIVER.
Of forfeiture. See INSURANCE, 4.
Of matter in abatement. See PLEADING.
Of objection as to issues triable. See APPEAL, 1.

WATERS.

Navigable streams. See BRIDGES, 5, 6.

The words *navigable stream* ordinarily mean a stream navigable in fact, one of sufficient capacity to permit of saw logs being floated down the same in times of high water and of small rowboats being used thereon to some extent, and such meaning must be attributed to such words when they are used in a legislative enactment, in the absence of ambiguity suggesting, reasonably, that a different meaning might have been intended which is discoverable by judicial construction. *Bloomer v. Bloomer*, 297

WATERWORKS: Purchase of. See MUNICIPAL CORPORATIONS, 18–25

WILLS.

Testamentary capacity: Finding contrary to evidence.

1. A finding by a jury, approved by the trial court, to the effect that the testator, at the time he executed the instrument in question, had not sufficient mental capacity to make a will, is *held* to be contrary to the clear preponderance of the evidence, which showed that he had sufficient capacity while the instrument was being drawn by an attorney, to whom he gave full directions therefor, and tended strongly to show that he consciously and understandingly participated in the final execution thereof, although his death followed in a few minutes. *Will of Muellenschlader: Trieloff v. Muellenschlader*, 364

Validity: Language not understood by testator: Presumption of due execution: Certificate of witnesses: Evidence.

2. The fact that a will was written in a language which the testator did not understand does not render it invalid where, before executing it, he was accurately informed of its contents and meaning in a language which he did understand. *Will of Arneson: Quale v. White*, 112

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3. When it is established that testator affixed his signature to the instrument and that the persons whose names appear as subscribing witnesses signed a certificate which declares all the steps required for due execution, there arises a strong presumption that such steps were taken; and such presumption need not be supported by affirmative memory of witnesses, but, to defeat the will, must be overcome by evidence to the contrary. *Ibid.*

4. Such presumption is not overcome by evidence that, after the testator had expressed his desire to execute the instrument and he and the first witness had signed, the latter, within hearing of the testator, directed the second witness to sign, which she did in the same room, although the testator's eyesight was so dim that he did not actually see the act of writing. *Ibid.*

Undue influence: Presumption: Evidence.

5. Where the trial court found as a fact that the evidence did not show such a situation as would give rise to a presumption of undue influence so as to throw the burden upon the proponent to show that none was exerted, and there is nothing to indicate that the rule of law in respect thereto was ignored or misapplied, such finding will not be disturbed unless contrary to the clear preponderance of the evidence. *Ibid.*

6. The evidence (showing, among other things, that a partner of the testator, to whom he bequeathed a considerable sum, had visited the testator frequently during his illness and did so four times on the day of his death, and that such partner had in his possession at the time the certificates of deposit mentioned in the will and the bank book of the testator) is *held* insufficient to create a presumption of undue influence. *Will of Muellenschlader: Trieloff v. Muellenschlader,* 364

Probate: Appeal: Costs. See APPEAL, 11.

Construction: Trusts: Power of trustees to apportion property, etc.

7. In each of several items a will provided that certain of the shares into which the estate was to be divided be held in trust by the executors during the term of two lives and nineteen years thereafter for the benefit of a certain person and his or her descendants, and directed or authorized the trustees, upon the termination of the trust or, in certain contingencies, before that time, to pay and transfer both the principal and income of said shares to the descendants, "giving to each of said descendants such portion thereof as my said trustees shall deem best." *Held,* that under the powers so granted the executors and trustees were permitted, in the exercise of a sound legal discretion, not arbitrarily nor through whim or caprice, to apportion the sums so given among the beneficiaries equally or unequally, or to give the whole to one or more, to the entire exclusion of the others. *Stephenson v. Norris,* 242

8. A subsequent item in the will—giving to the trustees discretion, as to all the provisions of the will, to withhold or diminish the share of any beneficiary who in their opinion should be unworthy or should not be of sufficient capacity properly to use and care for it—did not change or limit the general discretion as to apportionment given by the prior items, especially where such subsequent item itself, as well as other portions of the will, referred to and recognized that general discretion as another and different discretion from the discretion to withhold because of incapacity or unworthiness. *Ibid.*

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9. The will directed that all notes and obligations of any beneficiary or his descendants held by the testator at his death, including obligations barred by the statute of limitations, be appraised at the full amount of principal and interest unpaid and owing at the time of the death, and requested the trustees, in making division of the estate into parts, to assign said obligations to the parts to be held in trust for such beneficiary, it being expressly declared to be the testator's intention that no relative or his descendants benefited by the will should obtain an advantage over any other by reason of any advancement or assistance rendered to him or his descendants by the testator and evidenced by any such unpaid note or obligation held by the testator at the time of his death. *Held* that, notwithstanding a discharge in bankruptcy of a descendant of one of the beneficiaries named in the will, prior to the death of the testator, his notes given before such discharge and held by the testator at the time of his death must be considered unpaid obligations, to be assigned to and charged up against the share to be held in trust for such beneficiary and his descendants. *Ibid.*

10. Under the terms of the will, in assigning such obligations to the share of the estate to be held in trust for said beneficiary and his descendants, they should be appraised at the full amount of the principal and interest unpaid thereon at the time of the testator's death; and the trustees were authorized, in their discretion, to withhold from the maker of the notes and his descendants so much of the income and principal otherwise passing to them, from time to time, as would equal the full amount of principal and interest unpaid from time to time upon said notes, and to distribute the amount so withheld among the other descendants of said beneficiary named in the will. *Ibid.*

Same: Power in trust: Estate in possession: Precatory words.

11. Land was devised to testator's widow for her life, and an annuity was also bequeathed to her. Subject to such provision all the testator's property was given to his daughter and a grandson, it being provided that in case the daughter died before her husband her share be paid to her children, and that claims against the grandson, part being in favor of the estate absolutely and part contingently, should be charged to and deducted from his share. The duty of making such payments, as to both shares, was imposed on the executor, and the will stated that it was the testator's desire that the probate judge, after the settlement of the executor's account, appoint him trustee to control and manage the estate, to collect rents, pay all debts, and deposit all proceeds in savings bank until all debts were paid and the widow paid, from the proceeds of said rents, when her annuity became due. The will further directed that the real estate be kept intact until claims were paid, and then, if the heirs should prefer to continue receiving the proceeds, they might do so by securing payment of the widow's annuity. *Held*, that it was the testator's intention that the executor as trustee should continue in control of the estate under a power in trust during the lifetime of the widow, with power to convert the whole into money; and during such time the grandson had no estate in possession which would entitle him to maintain an action for partition. *Wolbert v. Beard*, 391

12. The request that the probate judge appoint the executor as trustee was equivalent to an appointment by the will. *Ibid.*

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13. When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction. *Ibid.*

14. In a will a trust may be created by intention of the testator discovered by aid of judicial construction, as well as by words taken in their literal sense. *Ibid.*

Same: Devise with limitation over in case of death without issue: Charge on land.

15. The rule that a devise to one with limitation to others in case of his death, or death without issue, is ordinarily to be construed as referring to death during the lifetime of the testator, is one which yields readily to anything in words or context to indicate a different intention of the testator. *Korn v. Friz,* 428

16. A will giving to the widow a life estate in all testator's land gave after her death his farm (constituting nearly half his estate) to a son "upon the express condition" that he pay to a daughter of the testator $5,000 within one year after the death of the widow, said $5,000 being devised and bequeathed to the daughter as her share of the estate. It then provided that in case of the death of said son without issue all of the real estate should go to the grandchildren of the testator who might be living at the time of the death of the said son,—it being stated to be the testator's desire that said real estate be kept and retained by persons of his own blood. *Held,* that in speaking of the death of the son without issue the testator referred to a death after his own as well as to one before; and that when the son took the farm after the death of the widow he did not take an absolute fee therein. *Ibid.*

17. The provision of the will as to the payment of $5,000 to the testator's daughter did not make the son's estate in the farm an estate upon condition; but it gave to the daughter the right to a lien or charge for that amount upon the whole title to the farm, which she could enforce or transfer to any one other than the son. *Ibid.*

18. Under sec. 2046, Stats. 1898, the death of the son "without issue" must be construed to mean his death without issue then living. *Ibid.*

Action to construe will: Jurisdiction of courts.

19. Executors and testamentary trustees, when they have real and serious doubts as to their duty, may, for their own protection, maintain an action in the circuit court for construction of the will, although no actual litigation or contest in respect thereto is pending. *Stephenson v. Norris,* 242

20. The mere fact that the questions involved would eventually arise for consideration in the county court, or that that court, under ch. 163, Laws of 1905, has power to construe a will in a proceeding brought solely for that purpose, does not make it improper for the circuit court to entertain such an action. *Ibid.*

Same: Allowances to guardians ad litem.

21. In an action brought by executors to obtain a construction of the will, allowances to the guardian *ad litem* of an infant brought in as defendant should not be made payable out of the body of the estate, but should be made payable only out of the infant's property under the control of the court, giving a lien thereon if necessary. *Ibid.*

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22. The compensation of a guardian *ad litem* for minors in an action for the construction of a will must be paid by his wards and not out of the estate of the testator generally, though it may be made a charge upon their interest in such estate. *Will of Korn: Korn v. Friz,* 428

23. Where on appeal in such an action the guardian *ad litem* did not appear further than to join by signature in the brief for the respondents, including the executor, the amount of his compensation will be left to the determination of the court appointing him. *Ibid.*

Election by widow: Right to share in property not disposed of.

24. Under secs. 2171, 2172, and subd. 6, sec. 3935, Stats. 1898, unless a widow renounces the provision made for her in her husband's will she is not entitled to share in any residue of his estate not disposed of by the will. *Hardy v. Scales,* 54 Wis. 452, followed. *Chapman v. Chapman,* 413

WITNESSES: Privilege: Self-crimination. See CRIMINAL LAW, 3-8.

WOMEN: Right to vote at elections pertaining to school matters. See ELECTIONS.

WORDS AND PHRASES.
Absolutely forfeit, in statute. See TAXATION, 68.
Aggrieved person, in statute. See EXECUTORS, 3.
Attempt to commit any felony, in statute. See CRIMINAL LAW, 1, 2.
Competent, in statute. See DRAINS.
Competitive bidding. See MUNICIPAL CORPORATIONS, 3, 6.
Contract, in constitution. See CONSTITUTIONAL LAW, 1.
Crossings, in ordinance. See MUNICIPAL CORPORATIONS, 12.
Death or *death without issue.* See WILLS, 15, 16, 18.
Debt. See TAXATION, 9.
Due process of law, in constitution. See TAXATION, 55, 59.
Duplicates. See EVIDENCE, 4.
Election, in statute. See ELECTIONS, 2.
Election pertaining to school matters, in statute. See ELECTIONS, 3.
Electors, in statute. See ELECTIONS, 4.
Engage in works of internal improvement, in constitution. See BRIDGES, 7.
Equal protection of the laws, in constitution. See TAXATION, 55.
Indebtedness of city. See MUNICIPAL CORPORATIONS, 21, 22.
Jeopardy, in constitution. See CRIMINAL LAW, 10.
Judicial power, in constitution. See TAXATION, 56.
Levy of taxes. See TAXATION, 39, 40.
Multiplicity of actions. See EQUITY, 6.
Navigable stream, in statute. See WATERS.
Other owners as interest may appear, in policy. See INSURANCE, 7.
Overt acts. See CRIMINAL LAW, 2.
Proximate cause. See TRIAL, 4.
Rated capacity of boiler. See CONTRACTS, 5.
Rule of taxation, in constitution. See TAXATION, 1, 6, 7.
Scalement of logs, in statute. See LOGS AND TIMBER, 1.
Taxes, in constitution. See TAXATION, 19-21, 29-31.
Transaction, matter, or thing concerning which he may testify, in statute. See CRIMINAL LAW, 6, 7.
Unpaid obligations. See WILLS, 9.
Void, in statute. See CORPORATIONS.
Warehouseman, in policy. See INSURANCE, 6.
Without issue. See WILLS, 18.

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